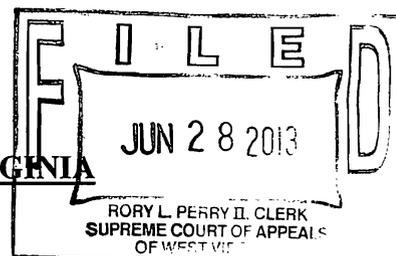


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 12-1505



Appeal from a Final Order of the
Circuit Court of Mineral County,
Civil Action No. 12-C-62

KEYSER HOUSE BONDS, L.L.C.,

Petitioner,

vs.

KEYSERHOUSE ASSOCIATES LTD
PARTNERSHIP and
CITY OF KEYSER,

Respondents.

RESPONDENT'S BRIEF

Submitted on behalf of Respondent,
Keyserhouse Associates Ltd Partnership

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RESPONDENT'S BRIEF

COMES NOW Keyserhouse Associates Ltd Partnership ("Respondent"), by and through its counsel, Nelson M. Michael, David Collins, and Nelson M. Michael, L.C., and in response to the brief of the petitioner, Keyser House Bonds, L.L.C. ("Petitioner"), states as follows:

III. STATEMENT OF THE CASE

Respondent makes the following corrections and additions to Petitioner's Statement of the Case:

1. On or about July 2, 2012, Respondents served and filed a Motion to Dismiss ("MTD"), based upon, *inter alia*, Rule 12(b)(1) of the *West Virginia Rules of Civil Procedure* ("WVRCP"). Pursuant to Rule 12(a)(3) of the WVRCP:

The service of a motion permitted under this rule alters [the time period for filing an answer] as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days *after notice* of the Court's action

Id. (emphasis added). However, the Circuit Court never denied the motion or gave notice that it was postponing its disposition until the trial on the merits; therefore, an answer never became due. In fact, the Circuit Court *granted* the City of Keyser's MTD, based upon Rule 12(b)(1) grounds, on August 21, 2012, but left the case open pending the outcome of the Bankruptcy case, which Petitioner admits: "[t]he Circuit Court agreed [with the respondent parties' argument that it lacked subject matter jurisdiction] and dismissed Petitioner's case; however, the Circuit Court reserved Petitioner's right to re-file the action . . . if the Bankruptcy Court chose not to exercise its exclusive jurisdiction." (Petitioner's Brief, p. 6, n. 5). Moreover, Petitioner never moved for default judgment against Respondent in the matter below and no such judgment was ever rendered against Respondent; therefore, Petitioner's footnote 2 contains an incorrect statement of law, and Petitioner's argument that the allegations in its Complaint for Declaratory Judgment

(“Complaint”) are deemed admitted as true lacks any merit. (Petitioner’s Brief, p. 2, n. 2).

2. Petitioner peppered its Statement of the Case and its Petition with averments that Respondent was “noticed” or received “notice” of various matters. Rather than respond to each such reference individually, Respondent hereby objects to any implication in Petitioner’s Brief that such communications complied with the notice requirements pursuant to the Indenture of Trust at issue herein (“Indenture”), the requisites for which are set forth in Article VI, Section 20 therein, and require that notices be sent registered or certified mail to all three: the Issuer (the City of Keyser), the Trustee (then Huntington Bank), and the Lessee (Respondent), at their designated and respective addresses. (Indenture, Art. VI § 20; A.R. 195). Petitioner offers no evidence that the City of Keyser was ever sent any such notices. Additionally, all such communications were sent prior to Petitioner’s claimed “Amended Maturity Date” of April 24, 2012. (Petitioner’s Brief, p. 3). *See also*, sections VI. A. 1. and 3., *infra*.

3. Petitioner’s reference to a letter concerning HUD violations was sent on April 19, 2012, according to the face of the letter itself. Therefore, Petitioner’s claim that the letter was sent on April 29, 2012 is incorrect. (Petitioner’s Brief, p. 4; A.R. 222).

4. Respondent objects to Petitioner’s assertions that “Respondent’s inattention to its responsibilities in maintaining Keyserhouse caused the tenants to live with inoperable kitchen appliances, non-functioning air conditioners, exposed wiring, and without lights, hot water or operable smoke detectors.” (Petitioner’s Brief, p. 3). Upon information and belief, such HUD citations applied mostly, if not entirely, to *unoccupied* units, which HUD does not treat separately in performing their assessments. Thus, the residents themselves were not subjected to such conditions. Furthermore, all such conditions were remedied either prior to, or soon thereafter, the filing of the Complaint in the matter below. Additionally, on or about October 15,

2012, RLJ Management, Inc. (“RLJ”) overtook the management of Keyserhouse and has since invested a substantial amount of time and money to renovate and address all issues with regard to the conditions of Keyserhouse. Respondent has had no role in the management of Keyserhouse since October 15, 2012.

5. The Indenture on file is not “missing a page,” as Petitioner claims, as all pages are sequentially numbered. Rather, there appears to be a break in the flow of text between pages 32 and 33 of the Indenture (Indenture, Art. VI, § 2; A.R. 188-189). However, because the version of the Indenture on file is the version actually signed by the parties to the transaction, the version of record on which the Petitioner had notice prior to the purchase of the bonds, and the version filed with the Complaint below that all parties have relied upon in making their arguments below, it is disingenuous for Petitioner to cry foul and blame the Indenture for the Trustee’s alleged “refus[al] to timely act” (Petitioner’s Brief, p. 5). In fact, Petitioner makes several claims that the Trustee “failed to promptly act,” but Petitioner offers no evidence to support its claim that it “s[ought] relief from Huntington Bank, acting as Trustee” *Id.* What is clear is that Petitioner refused to pay the Trustee’s fee, which does not appear to have even been discussed until on or about September 18, 2012:

[Mr. Sites:] It’s just that we’re not having any luck getting everyone to move. I mean, I don’t want to blame the Trustee anymore that I have to, but the letter I got yesterday said that they’re willing to move forward and probably do a sale, but they need \$25,000.00 up front. Well, under the Code, which governs Trustee sale fees, at 700,000, that’s only \$14,300.00. That’s a pretty excessive fee that the Trustee is trying to charge and wants the money up front. Any Trustee, it’s five percent of the first \$300.00 and two percent thereafter.

(Sept. Hr’g.; A.R. 71). Upon information and belief, the Trustee did not act because Petitioner failed to offer to pay any amount of the Trustee’s fee or to indemnify it, as required by the Indenture. (Indenture, Art. VII, § 1(e); A.R. 198). Additionally, there is no evidence in the

record that Petitioner contacted the Trustee prior to the sending of its letters, as discussed herein sections VI. A. 1. and 3., *infra*.

6. Respondent objects to the implication that Article VI, Section 13 automatically “entitled Petitioner to relief” without any further compliance with the terms of the Indenture, as Petitioner’s position misconstrues the Indenture, as argued herein, section VI., A. 3., *infra*. (Petitioner’s Brief, p. 6).

7. Respondent objects to the implication that Petitioner’s letter concerning the HUD deficiencies was sufficient notice under the Indenture to trigger Respondent’s right to cure under Article VI, Section 4, as Petitioner offers no evidence that it complied with Article VI, Section 20 of the Indenture nor does it offer any evidence that it brought such matters to the attention of the Trustee or that the Trustee, in turn, informed the City and Respondent of default pursuant to Article VI, Section 4 of the Indenture. Furthermore, Petitioner offers no evidence to support the implication that such HUD deficiencies were not cured within ninety days.

8. Respondent objects to the implication that Petitioner’s “evidence” presented at the September hearing was any more definite or persuasive than Respondent’s “evidence.” Both parties represented to the Court that they had willing entities interested in managing Keyserhouse, as well as potential purchasers. However, representations to the court by Respondent’s counsel were substantially more detailed, specific, and definite. (Sept. Hr’g.; A.R. 57-63).

9. Respondent adds that, upon information and belief, Petitioner purchased the bonds for a greatly reduced purchase price of approximately \$400,000.00, knowing full well that they were subject to the terms of the Reorganization Plan of the Bankruptcy Court.

10. Petitioner's characterization that the Circuit Court blindly set an amount for payments omits the prior pages of transcript where Petitioner's counsel repeatedly told the court that there was no set amount of payment due on account of the bankruptcy schedules ending and that he did not know what the amount should be. (Sept. Hr'g; A.R. 75-77).

11. Respondent objects to Petitioner's characterization of the October 29, 2012 hearing as a contempt hearing. The Circuit Court did not enjoin Petitioner from foreclosing on Keyserhouse as "punishment" to Petitioner, as it claims, but rather due to the fact that: (1) Petitioner had not complied with the prerequisites to initiating foreclosure proceedings under the Indenture; (2) Petitioner failed to join a necessary party (despite being given leave and the opportunity to do so as discussed herein, section VI. A. 4., *infra*); and (3) Petitioner came before the court seeking equity, and the Circuit Court ruled according to what it found to be most equitable to all those involved, including the residents of Keyserhouse.

IV. SUMMARY OF ARGUMENT

Rather than proceed under the specific terms of foreclosure set forth in the Indenture, Petitioner chose to file a declaratory judgment action ("Dec Action"), seeking the Circuit Court to, *inter alia*, "award any such . . . relief that it deem[ed] equitable, proper and in the pursuit of justice." (Complaint, p. 9; A.R. 124). Respondents argued below that Petitioner filed the Dec Action for the purpose of having the Court interpret the Indenture for it (Sept. Hr'g.; A.R. 39). Petitioner was told numerous times through counsel of the Respondent and the City of Keyser, *inter alia*, in court filings and at hearings below (particularly Respondent's Motion to Dismiss; A.R. 288) that they must follow the procedural steps in the Indenture exactly with regard to notice and Respondent's right to cure prior to initiating foreclosure proceedings, which Petitioner chose to disregard. Additionally, the Circuit Court made a specific finding that Branch Banking

and Trust Company (“BB&T”) was a necessary party that had not been joined in the litigation and granted Petitioner leave to amend its Complaint to include BB&T; however, Petitioner never followed-through. (Sept. Hr’g.; A.R. 74, 79-80). Petitioner sought equity in the Circuit Court, which issued its ruling based upon what it found to be most equitable to all involved. Finally, the final Order below held that Petitioner could not attempt foreclosure “without further order of this Court.” (Nov. Order, p. 6; A.R. 397). Had Petitioner complied with the notice and right to cure provisions in the Indenture—which it has still not done to this date—it could have reopened the case and requested an order to proceed.

Therefore, the November 13, 2012 Order of the Circuit Court of Mineral County should be affirmed.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requested oral argument pursuant to Rule 20 of the *Revised Rules of Appellate Procedure* on the issues of whether the Circuit Court’s order adequately protected Petitioners and the residents of Keyserhouse. While Respondent argues herein, *infra*, that the Circuit Court’s order does not impair the bonds negotiability and the issues raised by Petitioner regarding the residents of Keyserhouse is moot, Respondent agrees that oral argument is needed, based upon the following: (1) this case involves one or more issues of first impression and (2) this case involves one or more issues of fundamental public importance. Furthermore, Respondent submits the following new syllabus point for consideration by this Court: a party seeking to avail itself of rights and remedies under contract must comply with the reasonable notice and right to cure provisions therein prior to pursuing equitable remedies in the courts of this State.

VI. ARGUMENT

A. **The Circuit Court Properly Construed the Indenture of Trust and In So Doing, Properly Denied Petitioner’s Motion for an Injunction and Enjoined Petitioner from Foreclosing Without Further Order of the Court; the Circuit Court’s Order Does Not Violate Rule 52(a) of the WVRCP.**

The Indenture dictates the sole means of exercising any right to foreclose and Petitioner has only those remedies as set forth therein with respect to Keyserhouse. Petitioner failed to follow the procedures set forth in the Indenture, and instead chose to seek equity in the Circuit Court. Therefore, it was within the Circuit Court’s discretion to deny Petitioner’s injunction and enjoin Petitioner from foreclosing “without further order of [the] Court.” (Oct. Order; A.R. 397).

1. **Petitioner Failed to Comply with the Notice Requirements of the Indenture.**

Article VI, Section 20 of the Indenture provides:

Section 20. Notices. All notices hereunder shall be sufficient if sent by United States registered or certified mail, postage prepaid, addressed as follows:

TO THE ISSUER:	City of Keyser P. O. Box 220 Keyser, West Virginia 26726
TO THE TRUSTEE:	The National Bank of Keyser North Main Street Keyser, West Virginia 26726
TO THE LESSEE:	Keyserhouse Associates Ltd Partnership 4213 Great Oak Road Rockville, Maryland 20853

Any one of the aforesaid may, by like notice, designate any further or different addresses to which subsequent notices shall be sent.

(Indenture, Article VI, § 20; A.R. 195). The phrase “shall be sufficient” necessarily entails that a failure to send notice according to said provision is *not* sufficient (*expressio unius est exclusio alterius*). Insufficient notice is no notice at all. Therefore, in order for any communication to constitute notice as contemplated by the Indenture, the sender is required to send, United States

registered or certified mail, postage prepaid, notice of default to *all three* interested parties. Petitioner has provided no evidence that it sent any of the communications regarding default to the City of Keyser. Additionally, Petitioner provided no evidence that it sent any communication regarding default after the “Amended Maturity Date” of April 24, 2012.

Petitioner claims to have sent three communications to Respondent prior to the filing of its Complaint: (1) letter dated February 29, 2012, stating that “[t]he plan of reorganization matures April 24, 2012. At that time the unpaid bond balance will be \$665,789.22. The per diem rate thereafter will be the maximum default rate for bonds in the State of West Virginia” (Letter, dated February 29, 2012; A.R. 221); (2) letter dated April 19, 2012, titled: “NOTICE OF DEFAULT,” and stating that:

The Keyser House Bonds, LLC a West Virginia Limited Liability Company, Bond Holders and owners of The City of Keyser Commercial Bonds, Series 1981 (Keyser Project), also Secured Creditors in Chapter 11 Case # 01-18491, in the Maryland District at Greenbelt, are in possession of three Notices of Deficiencies from the HUD Office. You are hereby given formal Demand to Cure these deficiencies immediately. Failure to comply will result in the Bond Holders requesting the Indenture Bank to initiate the appointment of a receiver to maintain the property, occupants and rental income.

(Letter, dated April 19, 2012; A.R. 222); and (3) letter dated April 22, 2012, titled “NOTICE OF DEFAULT,” and stating that:

The Keyser House Bonds, LLC a West Virginia Limited Liability Company, Bond Holders and owners of The City of Keyser Commercial Bonds, Series 1981 (Keyser Project), also Secured Creditors in Chapter 11 Case # 01-18491, in the Maryland District at Greenbelt, are hereby Notifying you of Default in payment of the Bonds and secured claim due and owing on the 22nd day of April 2012. You are hereby given formal Demand to Cure the default immediately. Failure to comply will result in the Bond Holders requesting the Indenture Bank to initiate the appointment of a receiver to maintain the property, occupants and rental income.

(Letter, dated April 22, 2012).¹ However, as stated herein this section, *supra*, none of these communications complied with Article VI, Section 20 of the Indenture, nor were they sent on or after the alleged default (given Petitioner’s acknowledgement that the bonds did not mature until April 24, 2012). Therefore, Petitioner failed to comply with the notice requirements of the Indenture. *See also*, section VI. A. 3., *infra*.

2. Petitioner Failed to Allow Respondent the Right to Cure Under the Indenture.

Proper notice is key to Petitioner’s right to foreclose because it triggers Respondent’s right to cure any alleged default:

Section 4. Rights of Lessee, in Event of Default.

Whenever an event of default shall occur, the Lessee shall have the right to remedy such default within ninety days after notification of the occurrence thereof, provided that the Lessee shall pay all expenses incurred in the exercise of rights or remedies hereunder and all expenses of remedying such default. The Trustee covenants and agrees promptly to notify in writing the Issuer and the Lessee of any other default in the Indenture brought to its attention. The exercise of the remedies set forth in Section 2 of this Article is subject to the right of the Lessee under this Section to remedy a default as in this Section provided and limited.

Indenture, Article VI, Section 4 (emphasis added). Clearly, the language “after notification of the occurrence [of default]” means that that Respondent’s ninety day right to remedy any alleged default does not begin to accrue until *after* notice. *Id.* As argued herein, sections VI. A. 1., *supra*, and VI. A. 3., *infra*, Petitioner has never complied with the notice requirements of the Indenture, and Petitioner’s argument that “[i]f the ‘cash strapped’ KAP Respondent lacked the resources to make a few monthly five and seven thousand dollar payments, it certainly lacked the ability to pay Petitioner in full, regardless of any ninety day period” is completely lacking in merit because there is no legal authority whatsoever to support the notion that a the existence of a right is dependent on the ability of the person to whom it is owed to avail themselves of it.

¹ This letter was attached to Petitioner’s Complaint as “Exhibit 9” and filed with the Complaint, but for some reason was not included in Petitioner’s Appendix.

(Petitioner's Brief, p. 29).

If Petitioner's argument is accepted, why bother providing notice of foreclosure and/or a right to cure to a homeowner in default of their mortgage? After all, if the homeowner was able to make the payments, they would not have defaulted, so why not just sell the property immediately? Furthermore, Petitioner's position ignores the possibility that Respondent could have found financial assistance from a third party to cure at the last minute, as so often happens with mortgagors. If Petitioner's argument is that the amount of the final payment was so great that the scenario here is not analogous to the homeowner scenario, at what amount should the cut-off be drawn: Five Hundred Thousand Dollars; One Hundred Thousand; Fifty Thousand? Obviously Petitioner's position creates a slippery slope and is in clear derogation of the concept and purpose of "rights."

Assuming, *arguendo*, that Petitioner's letters dated April 19, 2012 and April 22, 2012, did provide sufficient notice under the Indenture, Respondent notes that Petitioner filed its Complaint on or about May 30, 2012—substantially sooner than ninety days from the so-called "notice." Therefore, Petitioner failed to allow Respondent the right to cure under the Indenture.

3. Petitioner's Position that Maturity of the Bonds Eliminates the Procedural Prerequisites to Foreclosure Violates the Letter and the Intent of the Indenture.

Petitioner argues that "[a]ny notice provision, curative right or other procedural niceties lost effect once the bonds matured and KAP Respondent failed to pay." (Petitioner's Brief, p. 23). Essentially, Petitioner's argument is that the bonds reaching maturity triggered Article VI, Section 13 of the Indenture to the exclusion of all other provisions in the Indenture. What Petitioner first fails to recognize is the distinction between the right to payment and the right to liquidate collateral pledged as security. For example, a common term under a promissory note is that in the event of default, the unpaid principal and interest becomes immediately due and

payable. This does not entitle the holder the right to liquidate collateral pledged as security without first complying with the contractual provisions governing the sale of that collateral. If no such provisions exist, the holder cannot take any property of the debtor without first obtaining and recording judgment.

Petitioner argues that the Indenture is “synonymous with [a] ‘deed of trust’” and asks this Court to hold that once the bonds matured, Article VI, Section 13 applied to the exclusion of all other provisions of the Indenture. (Petitioner’s Brief, p. 21, n. 8). However, Petitioner’s urged reading completely ignores the fact that Petitioner’s right to foreclosure (or to any other remedy) stems from Article VI, Section 2 of the Indenture, which Article VI, Section 4 limits: “[t]he *exercise of the remedies* set forth in Section 2 of this Article *is subject to* the right of [Respondent] under this section to remedy a default [within ninety days from notification].” (Indenture Art. VI, § 4; A.R. 191) (emphasis added). A plain reading of the phrase “the remedies set forth in Section 2” means *all* remedies listed in Section 2—which contains the remedy of foreclosure. Because Article VI, Section 4 of the Indenture applies “[w]hensoever an event of default shall occur,” a plain reading of this provision makes it clear that Respondent always has the right to cure for a period of ninety days from notification of *any* default. Clearly, failure to make the final payment on the bonds upon maturity constitutes a “default” under the Indenture. (Indenture, Art. VI, § 1; A.R. 188). Most negotiable instruments contain an acceleration clause that renders the note immediately due, and hence, “mature.” If this Court adopts Petitioner’s argument, such a holding would destroy the right to cure in most or all Indentures and Deeds of Trust.

Moreover, Petitioner misconstrues Article VI, Section 13 of the Indenture because it takes the provision cited to support its argument out of context:

Section 13. Bondholders Not to Enforce Remedies Hereunder Except Under Certain Conditions. It is expressly covenanted and agreed, and *the Bonds issued hereunder are subject to the condition that the holders of the Bonds shall not be entitled to institute any suit, action or proceeding at law or in equity to enforce any rights or remedies granted by this Indenture* unless and until the Trustee shall have refused or, for ten days following delivery to it of a written demand therefor, signed by the holders of not less than 60% of the Bonds, shall have failed to take appropriate remedial action authorized by the Indenture upon the happening of one or more events of default specified in Section 1 of this Article. Such demand shall specify and describe the default.

Nothing in the Indenture contained shall, *however*, affect or impair the right of the holders of the Bonds to *enforce* the payment of the principal of and interest on the Bonds at and after the maturity thereof, or the obligation of the Issuer to pay the principal of and interest on the Bonds to the holders thereof at the time, place, from the source and in the manner in the Bonds expressed.

(Indenture, Art. VI, § 13; A.R. 193-194) (emphasis added).

Petitioner cites the phrase “[n]othing in the Indenture contained shall, *however*, affect or impair the right of the holders of the Bonds to *enforce* the payment of principal and interest on the Bonds at and after the maturity thereof ” (Indenture Art. VI, § 13; A.R. 193-194) (emphasis added) to argue that all other provisions of the Indenture are inapplicable in the event that the bonds are not paid at maturity. (Petitioner’s Brief, pp. 22-23). The word “however” in the above clearly indicates that the paragraph continues to expound on the preceding paragraph, which limits the Petitioner’s right to take action in lieu of the Trustee and employs the word “enforce” in the particular context of seeking rights or remedies set forth in the Indenture: “the holders of the Bonds shall not be entitled to institute any suit, action or proceeding at law or in equity *to enforce* any rights or remedies *granted by this Indenture* unless and until [the Trustee refuses or fails to act under certain conditions].” (Indenture Art. VI, § 13; A.R. 194) (emphasis added). Thus, “enforce” is clearly limited to the “rights or remedies *granted by this Indenture*” (*Id.* at 194 (emphasis added)), which means those rights and remedies under Article VI, Section 2 of the Indenture (entitled “Remedies on Default” and from which the right to foreclose is contained),

which is in turn limited by Article VI, Section 4 of the Indenture.

Accordingly, the purpose of the first paragraph therein is to permit the bondholders to proceed upon the Trustee's expressed refusal to act or the Trustee's failure to act ten days after receipt of a written demand signed by the holders of not less than sixty percent of the bonds instructing the Trustee to do so. The purpose of the second paragraph is to permit the bondholders to bypass the Trustee and seek remedies under Article VI, Section 2 of the Indenture after maturity of the bonds. Therefore, when read in its proper context, the paragraph cited by Petitioner is clearly intended to allow the holders of the bonds to litigate or take other action permitted under Article VI, Section 2 of the Indenture without providing the Trustee a ten day first right of refusal. It does not allow Petitioners foreclose without complying with the other terms of the Indenture.²

It is clear from the record below that Petitioner did not seek to avail itself of the ten day rule set forth in Article VI, Section 13 of the Indenture, nor did it get the Trustee's expressed refusal, prior to sending the letters discussed herein, section VI. A. 1., *supra*. It is also clear that Petitioner sent all such letters prior to—not after—the maturity of the bonds. Therefore, Petitioner had no right to send any notice of default “unless and until”: (1) “the Trustee . . . refused” to institute suit, action, or proceeding at law or in equity; (2) “for ten days following delivery to it of a written demand therefor, signed by the holders of not less than 60% of the Bonds”; or (3) April 25, 2012, the date “after the maturity thereof.” (Indenture, Art. VI, § 13; A.R. 194). Article VI, Section 13 of the Indenture—when read as a whole and *in pari materia* with Sections 2 and 4 of Article VI of the Indenture—is not some sort of “super remedy” hovering in the ether above and to the exclusion of the rest of the Indenture; therefore,

² Pursuant to Article VI, Section 2 and Article VII, Section 1 of the Indenture, the Trustee cannot be compelled by the holders of the bonds to take action unless and until it is indemnified against loss, cost, liability, and expense, which Petitioner apparently failed to do. *See, e.g.*, Sept. Hr'g., p. 39; A.R. 71).

Petitioner's argument simply does not hold water. Because it took it upon itself to "Enforce Remedies" under the Indenture without waiting for the "Certain [enumerated] Conditions" to occur, Petitioner clearly violated the very section of the Indenture on which it now seeks to hang its hat.

4. Petitioner Failed to Join a Necessary Party to the Litigation Despite Being Directed to Do So and Despite Representations to the Circuit Court that It Would.

The Circuit Court found BB&T to be a necessary party and granted Petitioner leave to amend the Complaint to include it in the litigation below (Sept. Hr'g.; A.R. 74). Amazingly, Petitioner even inquired and was instructed on how to accomplish this:

MR. SITES: One more question I have on the Court's leave for me to amend the Complaint, I have no allegations against BB&T. I have nothing to add to the Complaint. I guess they would simply be a noticed Defendant? Do I need to amend the Complaint or is the Court just directing me to serve them with a copy of today's Order saying they're a necessary party? I have no allegations and I don't know if there are any.

THE COURT: Since you raised the issue, I'll . . .

MR. LLEWELLYN: In my experience in the past, Your Honor, I would suggest that it would be adequate for him to file - - -, instructing the Court to add them as a party and serve them with a copy of the Complaint.

MR. SITES: I can serve them, but they're not named and . . .

MR. LLEWELLYN: I don't think there's any question of jurisdiction or any of those things you would normally put into a Complaint, so . . .

MR. SITES: I would serve them with a Summons and the Summons should cover it because it says, you're here in a Court action; you've got twenty, thirty days to show up and protect your interest, is what they say.

THE COURT: That would be fine.

(Sept. Hr'g.; A.R. 79-80). Upon information and belief, Petitioner made no effort to follow through on serving BB&T.

5. The Circuit Court's Order Does Not Violate Rule 52(a) of the WVRCP.

Pursuant to WVRCP, Rule 52(a), “in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.” Furthermore, “[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence . . .” *Id.* The purpose of Rule 52(a) is to provide the parties with an explanation for the court’s ruling and to provide sufficient information on the record for meaningful appellate review. A review the transcripts and orders below reveal that the Circuit Court fully stated its grounds for its decision and accomplished both objectives of the rule. Therefore, the Circuit Court did not violate Rule 52 of the WVRCP.

B. Requiring Petitioner to Comply with the Prerequisites to Foreclosure Does Not Destroy the Negotiability of the Bonds; the Circuit Court's Ruling Protects the Residents of Keyserhouse and Assures Their Ability to Retain Safe, Sanitary, and Affordable Housing.

“Each holder, by the acceptance of this Bond, consents to *all* the provisions of the Indenture.” (Indenture, Form of Bond, p. 8; A.R 164) (emphasis added).

Petitioner’s first assignment of error is subdivided into two separate arguments: (1) “[t]he Circuit Court’s decision to impose the cure provision of the Indenture on the promise to pay renders these bonds, and all other similarly situated bonds, non-negotiable” and (2) “[t]he Circuit Court’s decision to enjoin Petitioner from foreclosing on Keyserhouse violated West Virginia’s public policy of providing needy citizens a right to safe, sanitary and affordable housing.” (Petitioner’s Brief, pp. 15, 18). Petitioner’s first argument ignores the terms of the face of the bonds themselves and incorrectly argues that a procedural process with respect to liquidating collateral pledged as security for the bonds destroys their negotiability under Article 3 of the

Uniform Commercial Code (“U.C.C.”).³ Petitioner’s second argument incorrectly assumes that Petitioner’s proposed course of action materially deviated and would have been more beneficial to the residents of the Keyserhouse than that of Respondent.

First, Petitioner failed to raise the issue of negotiability below. “In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.” Syl. Pt. 1, *Mowery v. Hitt*, 181 S.E. 2d 334 (1971). Second, the Indenture gives Petitioner (as holder of more than sixty percent of the bonds) the right to foreclose upon failure or inaction of the Trustee or maturity, provided that it complies with certain procedural pre-requisites—particularly the notice and right to cure provisions. Rather than follow the procedural requirements—for which the holders took the bonds subject to—Petitioner chose to seek relief in Circuit Court requesting, *inter alia*, that the Circuit Court, “pursuant to [its] Jurisdiction in matters of equity . . . [d]eclare that the Plaintiff has direction over the appropriate remedy, whether by foreclosure, appointment of a receiver, or the renegotiation of a new lease between the City of Keyser and a prospective lessee” (Complaint, p. 8; A.R. 123); and further that the Circuit Court “enter an Order . . . appoint[ing] [Petitioner] to manage or procure a proper party to manage the Keyserhouse” (Motion for Injunctive Relief, p. 2; A.R. 227). Thus, the bulk of the relief requested by Petitioner was apparently in equity, because the Indenture—the sole document conferring the remedy of foreclosure to Petitioner in the event of default—does not contain any right of Petitioner to “re-negotiate a new lease” or to “manage” or “procure” a new managing party. Whether to grant equitable relief is left to the discretion of the Court. Furthermore, rather than

³ The bonds at issue are governed by *W. Va. Code* § 13-2C-1, *et seq.* Additionally, “investment securities, such as debentures, are not included within the rules and restrictions of article 3 but are, rather, controlled by article 8 of the Uniform Commercial Code and are negotiable.” *Friedman v. Airlift Intern., Inc.*, 44 A.D.2d 459, 461, 464 (N.Y. App. Div. 1974) (Lane, J., dissenting). Pursuant to *W. Va. Code* § 46-3-102, “[t]his article . . . does not apply to . . . securities governed by article eight.” *Id.*

limit its claim to the relief afforded to it by the Indenture, Petitioner's prayer for relief in its Complaint contained at least ten items and its and Motion for Injunctive Relief moved for at least three items of relief, thereby presenting a smorgasbord from which to choose. The Circuit Court ruled according to what it found to be the most equitable to all involved, based on Petitioner's prayer for relief that it "award any such other relief that it deems is equitable, proper and in the pursuit of justice." (Complaint, p. 9; A.R. 124).

Finally, if the right to foreclose on the collateral is subject to any terms and conditions other than the promise to pay, as Petitioner claims, then the very provision Petitioner would have this Court apply to the exclusion of all others cannot stand: "[i]t is expressly covenanted and agreed, and *the Bonds hereunder are subject to the condition that . . .*" (Indenture Article VI, § 13; A.R. 193-194) (emphasis added). However, the reason Petitioner's argument seems instinctively wrong is because it is. In fact, assuming *arguendo* that Article 3 of the U.C.C. governs the bonds, W. Va. Code § 46-3-106(b) explicitly rejects Petitioner's argument: "[a] promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral" Therefore, Petitioner's argument that a condition with respect to the right to liquidate collateral pledged as security is entirely without merit. The comments to *U.C.C.* § 3-106 support and further clarify Respondent's position:

Subsection (b)(i) allows a reference to the appropriate writing for a statement of these rights. For example, *a note would not be made conditional* by the following statement: "This note is secured by a security interest in collateral described in a security agreement dated April 1, 1990 between the payee and maker of this note. Rights and obligations with respect to the collateral are [stated in] [*governed by*] the security agreement." The bracketed words are alternatives, either of which complies.

U.C.C. § 3-106 cmt. 1 (emphasis added).⁴ Thus, it is abundantly clear that the rights and obligations with respect to *collateral* may be governed by a separate document—here, the Indenture—which may impose procedural prerequisites to foreclosure without affecting the negotiability of the associated instrument. To hold otherwise would render the right to cure under all deeds of trust meaningless.

As to Petitioner’s second point with regard to its first assignment of error, there is no evidence to suggest that Petitioner’s plan would better protect the residents of Keyserhouse than the Circuit Court’s ruling. Petitioner sought to foreclose on Keyserhouse—which would have likely resulted in the loss of HAP funding, thereby putting the residents at risk of eviction. Even if Petitioner brought in an outside management company and continued to receive HAP funding, the Circuit Court was not obliged to prefer Petitioner’s proposal over Respondent’s. RLJ assumed all management functions in October of 2012, and has had no issues with HUD. RLJ has invested a significant amount of resources and labor in renovations and addressing the safety and welfare of the residents of Keyserhouse. Therefore, Petitioner’s argument is moot.

C. The Circuit Court Did Not Err in Setting Payment Amount; Furthermore, the Issue Is Essentially Moot.

Petitioner argues that the circuit Court arbitrarily calculated the monthly payment without evidence. (Petitioner’s Brief, p. 25). In support of this claim, Petitioner cites the September Hearing where the Circuit Court set the amount at Five Thousand Dollars per month. However, Petitioner fails to recognize the statements of counsel leading up to that ruling, whereby Petitioner essentially argued that it had no idea what the amount should be:

THE COURT: Isn’t there a set amount now, what they’re supposed to be paying?

⁴ This Court has expressly adopted “the official commentary to the UCC as a part of our Code” and assumes that “the legislature was aware of this commentary when it adopted [the U.C.C.]” *Greer Limestone Co. v. Nestor*, 175 W.Va. 289, 294, 332 S.E.2d 589, 594 (1985).

MR. SITES: No, sir.

MR. MICHAEL: I'm totally unfamiliar with that end of it, Your Honor. I would presume that there would have been some regular payment that would have been set, allegedly to retire those bonds on the schedule they were running on. If the Court would like, *I can inquire and find out what that amount was and . . .*

MR. SITES: There is no set amount. There was originally some payments to pay them off in thirty years, which would have been July 1, 2011. That began to fall behind in 2000, in 1999. It then went to Bankruptcy Court.

MR. MICHAEL: I think the loan, not to cut Mr. Sites off but I believe, I would ask him to correct me if I'm wrong, but I believe that loan was restructured maybe after the bankruptcy, or as a part of the bankruptcy . . .

MR. SITES: No. The Bankruptcy Court - - - the last six years was \$7500.00, \$8500.00 if there was 90 percent occupancy, with a balloon payment April the 24th of this year. That would have paid it off. But those bankruptcy payment schedules are now over. That bankruptcy case is closed. *So there is no set amount in any document*, because the original lease has expired basically. The Indenture of Trust was scheduled to end. It was never modified. And the Bankruptcy Court is over.

. . .

THE COURT: The last amount, you're saying was 8500?

MR. SITES: Only if they were at 90 percent occupancy and they are not.

(Sept. Hr'g.; A.R. 75-77) (emphasis added). Thus, it is clear that Petitioner's counsel did not offer any real evidence as to the amount, nor did he really advocate for any particular amount. Respondent's counsel offered to look into the issue and determine the previous amount, and was interrupted by Petitioner's counsel to advise the Circuit Court that there was no set amount.

Furthermore, this issue is essentially moot because the company who took over the management of Keyserhouse—RLJ—has been paying approximately Eight Thousand Dollars per month since January of this year and was paying well above the Five Thousand Dollars ordered by the Circuit Court prior thereto, per agreement of the parties. This amount covers the amount of principal and interest previously calculated with additional funds that are supposed to

be applied toward additional principal, per the agreement. However, upon information and belief, rather than pay the excess toward additional principal as it is made available and per the agreement of the parties, Petitioner has been using the excess to pay its own legal fees.

D. The Circuit Court Did Not Find Petitioner in Contempt; Petitioner Was Merely Enjoined from Foreclosure *Without Further Order* of the Court.

Petitioner's position that the Circuit Court found it in contempt is puzzling. Nowhere in the Circuit Court's orders or in the hearing transcripts does the Circuit Court make any such finding. The Circuit Court did enjoin Petitioner from foreclosing *without further order*. (Oct. Order; A.R. 397).

THE COURT: Okay. I'm going to end this. Mr. Sites, at the end of your Complaint, and I recognize this is maybe standard boiler plate language, but you said: "That the Honorable Court award any such other relief that it deems equitable, proper and in the pursuit of justice." And the Court came up with something at the last hearing that it deemed equitable, proper and in the pursuit of justice, and by taking this action you're trying to sabotage those efforts, clearly in violation of what the Court was trying to accomplish in response to your original action of bringing this before the Court.

So I'm going to find first of all, that Huntington Bank has, by virtue of this Notice dated October 25th has been removed as Trustee. By, under the Indenture agreement, which is proper by the City and the Lessee, and that they are no longer the Trustee in this matter and cannot proceed to any foreclosure. And I guess I'll keep them in as a party in case there are any type of cross-claims or anything. I'm hoping we're not going to get into that, but if there are, I guess we have to keep them in for those purposes. And, you know, I'm finding that the bondholders, everybody's interests will be promoted by proceeding with the sale that's been outlined here by Mr. Michael and which was anticipated by the Court's last ruling.

So, and I'm finding that, you know, that the Trustee, the sale, the foreclosure cannot go forward. Any other particular findings or guides that anybody needs?

Oct. Hr'g.; A.R. 108-110). However, a review of the orders and hearing transcripts herein make it clear that this ruling was based on the following: (1) Petitioner failed to comply with the procedural requirements of the Indenture, which were prerequisites to the sale of the collateral;

(2) the Trustee was found to be have been properly removed by Respondent and the City of Keyser pursuant to the procedure set forth in the indenture; (3) Petitioner sought equitable relief and the Circuit Court ruled according to what it found to be most equitable under the circumstances; and (4) Petitioner failed to join a necessary party. (Sept. Hr'g. and Order; A.R. 74, 79-80; 382). Moreover, since the matter was not dismissed with prejudice, and the Circuit Court's final Order specifically held only that Petitioner was not permitted to "proceed with a foreclosure against the Keyserhouse *without further order of this Court,*" (Oct. Order; A.R. 397) nothing prevented Petitioner from re-opening or re-filing the case and seeking an order to proceed with foreclosure upon a showing of compliance with the notice and cure provisions of the Indenture and joining the necessary party.

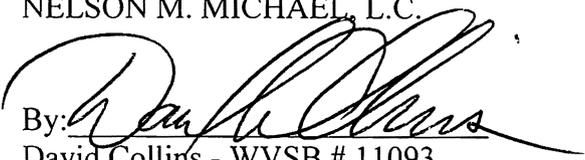
VII. CONCLUSION

For the reasons set forth herein, *supra*, and particularly because Petitioner failed to comply with the terms of the Indenture and failed to join a necessary party, the Circuit Court was well within its discretion to enjoin it from foreclosing without further order of the Court. Accordingly, the November 13, 2012 Order of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Collins, do hereby certify that I caused a true and accurate copy of the foregoing **Respondent's Brief** to be served upon the following counsel of record by United States mail, postage prepaid, on this 27th day of June, 2013:

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