IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by the Pennsylvania Turnpike Commission of Property Located in Londonderry Township, Dauphin County, Commonwealth of Pennsylvania, for the Swatara Creek Bridge Replacement Project, MP 250 to 251.8 of the Pennsylvania Turnpike (Parcel No. 34-5-70-0-0)	:	
	:	No. 2015 C.D. 2012
Craig L. Bostdorf and Cynthia Rose Bostdorf, Appellants	:	Argued: June 17, 2013
v.	:	
Pennsylvania Turnpike Commission	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: August 2, 2013**

Craig L. Bostdorf and Cynthia Rose Bostdorf (Appellants) appeal an October 3, 2012 order of the Dauphin County Court of Common Pleas (Trial Court) distributing to the Appellee, Fulton Bank (Bank), the entire amount of just compensation for Appellants' property at 993 Swatara Creek Road in Middletown (Property), which was condemned by the Pennsylvania Turnpike Commission

(Commission).[1] For the reasons discussed below, we affirm the order of the Trial Court.

On August 6, 2009, the Commission filed a Declaration of Taking in the Trial Court for the Property. (Declaration of Taking, Reproduced Record (R.R.) at 41a.) The purpose of the taking was for the reconstruction of the Turnpike's Swatara Creek Bridge. (*Id*. ¶4, R.R. at 42a.) The Commission and Appellants subsequently negotiated an agreement as to the fair market value of the Property of $333,700.[2] (Petition to Distribute Damages ¶4, R.R. at 53a.)

At the date of condemnation, the Bank held two mortgages on the Property in the total amount of $452,000. Appellants granted the Bank a mortgage on the Property on February 23, 2007 in the amount of $232,000 (First Mortgage).[3] (February 23, 2007 Mortgage Security Instrument (First Mortgage Instrument), R.R. at 134a.) The Bank is identified as the "lender" in the First Mortgage security instrument. (*Id*. p. 2, R.R. at 135a.) Mortgage Electronic Registration Systems, Inc. (MERS) is identified as the "mortgagee" and described as "a separate corporation that is acting solely as the nominee for the Lender and Lender's successors and assigns." (*Id*. p. 1, R.R. at 134a.) MERS is not a lender, but rather a company that maintains a national electronic database for the purpose of tracking the transfers of the beneficial ownership of mortgages, while acting as the mortgagee of record for those mortgages. (Bank's Petition to Distribute Funds, Ex. 3, Affidavit of James Pesavento (Pesavento Aff.) ¶¶7, 8.)

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[1] The Commission is not participating in this appeal.

[2] The Commission also agreed to pay $63,000 to Appellants in relocation expenses. (July 25, 2012 Trial Court Memorandum and Order pp. 3, 5.) The relocation expenses are not at issue in this appeal.

[3] The First Mortgage was recorded on February 28, 2007 as instrument number 20070008022.

On March 12, 2007, Appellants granted the Bank a second mortgage on the Property in the amount of $220,000 (Second Mortgage)[4] as partial collateral for loans made by the Bank to Misty Meadows Landscape, Inc. (Misty Meadows), a business co-owned by Appellant Craig Bostdorf and his brother, Douglas Bostdorf. (March 12, 2007 Open-End Mortgage Security Instrument (Second Mortgage Instrument), R.R. at 162a; February 21, 2007 Letter from Bank to Misty Meadows (Loan Letter), R.R. at 127a.) The Bank is identified as the "lender" on the Second Mortgage security instrument, and, unlike the First Mortgage, no "mortgagee" is identified in the instrument. (Second Mortgage Instrument p. 1, R.R. at 162a.) Both the First Mortgage and Second Mortgage granted the Bank permission to participate in any condemnation proceedings on the Property. (First Mortgage Instrument p. 8, R.R. at 141a; Second Mortgage Instrument p. 7, R.R. at 167a.)

The Bank made two loans to Misty Meadows on March 12, 2007 in the amounts of $230,000 and $220,000, and Misty Meadows executed a promissory note in favor of the Bank for each loan (collectively, the Notes). (Misty Meadows $230,000 Promissory Note ($230,000 Note), R.R. at 160a.; Misty Meadows $220,000 Promissory Note ($220,000 Note), R.R. at 218a.) The purpose of the loans was in part to finance the purchase of a business property at 1940 Geyers Church Road in Londonberry Township, and each of the Notes was secured by an open-end mortgage on the 1940 Geyers Church Road property in the same amounts as the Notes. (Loan Letter p. 3, R.R. at 129a; Geyers Church Road Property $230,000 Open-End Mortgage Security Instrument, R.R. at 197a; Geyers

[4] The Second Mortgage was recorded on March 12, 2007 as instrument number 20070009839.

Church Road Property $220,000 Open-End Mortgage Security Instrument, R.R. at 221a.).

The Second Mortgage served as collateral for the $220,000 promissory note. ($220,000 Note p. 2, R.R. at 219a.) The Notes were also secured by commercial guaranties made by Appellants and Douglas Bostdorf. ($230,000 Note p. 2, R.R. at 161a.; $220,000 Note p. 2, R.R. at 219a.) The commercial guaranty executed by Appellants lists a "mortgage" on the Property as collateral for the guaranty, but does not specify whether this mortgage is the First Mortgage or Second Mortgage. (Appellants' Commercial Guaranty p. 2, R.R. at 253a.) Appellants contend that the First Mortgage was "incorporated" into the Notes as collateral for the loan, and thus both the mortgages on the Property stood as collateral for the loans to Misty Meadows.[5] (Appellants' Brief p. 6.)

Misty Meadows ceased paying the monthly installment payments on the Notes in May 2010. (Complaint for Confession of Judgment against Misty Meadows (Complaint) ¶¶7, 19, R.R. at 189a, 191a.) On February 15, 2011, the Bank filed a Complaint for Confession of Judgment against Misty Meadows for the debts owed on the Notes – including the principal, interest, late fees and attorneys' fees – totaling $502,239.37 as of that date. (*Id.*, ¶¶10, 22, R.R. at 190a, 192a.) The Bank cited and attached to the Complaint the two open-end mortgages on the business property located 1940 Geyers Church Road as security on the Notes, but did not mention or attach either the First Mortgage or Second Mortgage

[5] The Bank states in its brief that the Second Mortgage stood as security for Appellants' commercial guaranty. (Bank Brief p. 2.) While the Bank does not argue as much, it appears that the Bank disagrees with Appellants' contention that the First Mortgage was ever included as collateral for the Notes. Because we affirm the Trial Court's order distributing the funds to the Bank, we need not address this factual discrepancy.

on the Property. (*Id*., ¶¶6, 18, Exs. B, D, R.R. at 189a, 191a, 197a, 221a.) The Prothonotary noticed the entry of judgment on March 26, 2012. (Notice of Entry of Judgment, R.R. at 185a.)

In the instant proceeding, the Commission petitioned the Trial Court pursuant to Section 521 of the Eminent Domain Code (Code), 26 Pa. C.S. § 521, to distribute the agreed upon just compensation of $333,700 to the Bank, as the holder of two mortgages on the Property in excess of this amount. (Commission's Petition to Distribute Damages, R.R. at 53a.) Appellants opposed the distribution to the Bank, and, because of this dispute as to who was entitled to the just compensation award, the Commission deposited the compensation with the Trial Court. (Appellants' Reply to Petition to Distribute Damages, R.R. at 61a; March 28, 2012 Trial Court Order.) The Bank intervened, and both Appellants and the Bank filed petitions to distribute the just compensation in their own favor. (July 24, 2012 Trial Court Order; Appellants' Petition to Distribute Funds, R.R. at 76a; Bank's Petition to Distribute Funds, R.R. at 317a.)

On October 3, 2012, the Trial Court ordered the distribution of the entirety of the just compensation to the Bank. (October 3, 2012 Trial Court Order.) Appellants appealed.

Appellants present two arguments before this Court on appeal.[6] Appellants first argue that when the Bank filed its Complaint for Confession of Judgment against Misty Meadows for defaulting on the Notes on February 15, 2011, all of the Bank's interests under the Notes merged into that judgment,

[6] Our scope of review in an eminent domain case is limited to a determination of whether the trial court committed an abuse of discretion or an error of law. *Condemnation by Valley Rural Electrical Co-op., Inc. v. Shanholtzer*, 982 A.2d 566, 570 n.4 (Pa. Cmwlth. 2009).

including its interests under the First Mortgage and Second Mortgage. The basis for this argument is the doctrine of merger, which provides "that judgment settles everything involved in the right to recover, not only all matters that were raised, but those which might have been raised. The cause of action is merged in the judgment which then evidences a new obligation." *Lance v. Mann*, 360 Pa. 26, 28, 60 A.2d 35, 36 (1948) (citations omitted); *Smith v. I.W. Levin and Company, Inc.*, 800 A.2d 374, 379 (Pa. Cmwlth. 2002). Thus, Appellants argue, by reducing the Notes to judgment after the date of condemnation, all of the collateral that secured the Notes – including the First Mortgage and Second Mortgage – were also merged into that judgment. To allow the Bank to proceed on its interests through the judgment and in the condemnation proceeding would, in Appellants' view, thwart the purpose of the doctrine of merger and allow for duplicative litigation. *Lance*, 360 Pa. at 28, 60 A.2d at 36.

Problematic to Appellants' argument, however, is the fact that the Complaint for Confession of Judgment does not cite the Bank's interest in the mortgages on the Property as security for the Notes. The Complaint was filed *in personam* against Misty Meadows for the principal, interest and fees owed on the Notes, totaling over $500,000. The Complaint does incorporate by reference the two mortgages on the business property at 1940 Geyers Church Road (Complaint, ¶¶6, 18, Exs. B, D, R.R. at 189a, 191a, 197a, 221a.), but does not mention the mortgages on the Property. The only mention of the Property in the Complaint is to indicate that it was the last known address of Misty Meadows. (*Id*., ¶2, R.R. at 188a.) Nor does the Complaint mention the Appellants or cite the Appellants as guarantors for Misty Meadows.

Even if we accepted Appellants' strained interpretation of the Complaint for Confession of Judgment as incorporating the Bank's interests in the Property, the doctrine of merger would be inapplicable here because, under Section 521 of the Code, the Bank's mortgage interests in the Property were transformed into equitable liens on the condemnation award at the date of the taking in 2009.

Section 521 provides that:

> Damages payable to a condemnee...shall be subject to a lien for...all mortgages, judgments and other liens of record against the property for which the particular damages are payable, *existing at the date of the filing of the declaration of taking*. ...The liens shall be paid out of the damages in order of priority before any payment to the condemnee, unless released.

26 Pa. C.S. § 521(a)(1), (2) (emphasis added). Our Supreme Court has explained that a mortgage-holder loses a mortgage lien when a property is condemned, but "retains an equitable lien as security for the debt upon the damage award for the land that was taken in the condemnation proceeding," which "stands in place of and as a substitute for the land that was taken and can be applied to satisfy the debt." *In re De Facto Condemnation and Taking of Lands of WBF Associates, L.P. by Lehigh-Northampton Airport Authority*, 588 Pa. 242, 265, 903 A.2d 1192, 1205-06 (2006). When a mortgaged property is condemned, "the law substitutes the condemnation award for the security previously provided by the mortgage." *Id*. at 265, 903 A.2d at 1205. That the mortgage security interest would continue on the land after condemnation "would be unthinkable," as this "would materially interfere with the completion of the purposes for which the government...[has] taken the property through eminent domain." 588 Pa. at 264, 903 A.2d at 1205. (quoting *Briegel v. Briegel*, 307 Pa. 93, 96, 160 A. 581, 582 (1931)).

Consequently, as a result of the taking in 2009, the Bank's interests were converted from mortgage liens on the Property to equitable liens on the just compensation award. *WBF Associates, L.P.*, 588 Pa. at 264-65, 903 A.2d at 1205-06. While the First Mortgage and Second Mortgage were included as collateral in the Notes when they were executed in 2007, the Commission's taking of the Property in 2009 extinguished the mortgages, Appellants' title and the Bank's mortgage liens. *Id.* In place of these interests, Appellants and the Bank each were endowed with an interest in the compensation award. *Id*. While these interests were in the same pot of money, Appellants and the Bank no longer stood face-to-face in a debtor-creditor relationship. Thus, at the time the Bank filed its Complaint for Confession of Judgment against Misty Meadows in 2011, the Notes could no longer have been secured by mortgage interests in the Property. Appellants have cited no authority, and we see no reason to believe, that the equitable liens on the compensation award would replace the mortgage liens as collateral for the Notes.[7] Accordingly, we reject Appellants' argument that the doctrine of merger extinguished the Bank's equitable liens on the compensation award for the taking of the Property.

Appellants next argue that the First Mortgage did not provide the Bank with a sufficient interest to make a claim against the condemnation award, because the Bank was identified as the "lender" in the First Mortgage security

[7] Even assuming the equitable liens were incorporated as collateral for the Notes, liens are not subject to the merger doctrine and survive a later judgment concerning the same debt. *See* Restatement (Second) of Judgments § 18 (comment g) ("[I]f a creditor has a lien upon property of the debtor and obtains a judgment against him, the creditor does not thereby lose the benefit of the lien."); *see also* 46 Am. Jur. 2d Judgments § 462 (2013); 50 Corpus Juris Secundum Judgments § 934 (2013).

instrument. (First Mortgage Instrument p.2, R.R. at 135a.) Instead, in Appellants' view, MERS, as the "mortgagee" under the First Mortgage instrument, was the only appropriate party to make a claim against the condemnation award for the money owed by Appellants on the First Mortgage, and, because MERS failed to appear below, it waived its interest. (*Id*. p. 1, R.R. at 134a.) Because, as discussed above, the mortgage lien is transformed into an equitable lien upon the taking of the property, the issue is whether the equitable lien for the First Mortgage was conferred in MERS or the Bank as a result of the taking.

The Code sheds little light on this issue. Neither "mortgagee" nor "lender" is defined in the Code. Section 521 of the Code provides that the condemnation damage award "shall be subject to a lien for...all mortgages, judgments and other liens of record against the property," but it does not state what party to a mortgage is entitled to that lien. 26 Pa. C.S. § 521(a)(1). The Code does provide "mortgagees" (along with judgment creditors and other lienholders on a condemned property), with various rights, including a right to notice of condemnation and a right to intervene in the condemnation proceeding. 26 Pa. C.S. §§ 305(a), 506(c). However, there is no reason to believe that the use of the term "mortgagee" in the Code is to the exclusion of a "lender," particularly when a "mortgagee" is often defined as a "lender."[8] Further, as in the case of the Second Mortgage to which MERS was not a party (Second Mortgage Instrument p. 1, R.R. at 162a.), a "mortgagee" and "lender" are often the same entity.

[8] *See, e.g.*, Black's Law Dictionary 1104 (9th ed. 2009) (defining "mortgagee" as "[o]ne to whom property is mortgaged; the mortgage creditor, or lender"); 12 Pa. Code § 31.201 (defining "mortgagee" in Emergency Mortgage Assistance regulations as a "lender whose debt is secured by a mortgage").

In support of their argument, Appellants point to language of our Supreme Court's decision in *WBF Associates, L.P.*, which held that under Section 521 of the Code the "*mortgagee*, although losing its mortgage lien upon the condemned property, retains an equitable lien as security for the debt upon the damage award for the land that was taken in the condemnation proceeding." 588 Pa. at 265, 903 A.2d at 1206 (emphasis added). Appellants argue that the First Mortgage security instrument unequivocally defines MERS as the "mortgagee" and Fulton Bank as the "lender," and "when the words [of a contract] are clear and unambiguous the intent is to be determined only from the express language of the agreement." *Robert F. Felte, Inc. v. White*, 451 Pa. 137, 143, 302 A.2d 347, 351 (1973).

Contrary to Appellants' contention, our analysis is not confined to "the nomenclature the parties apply to their relationship," but rather we must look at the entirety of the writing in order to determine its purpose and legal effect. *Capozzoli v. Stone & Webster Engineering Corporation*, 352 Pa. 183, 186-87, 42 A.2d 524, 525 (1945) (quoting *Kelter v. American Bankers' Finance Co.*, 306 Pa. 483, 492, 160 A. 127, 130 (1932)); *see also Major's Furniture Mart, Inc. v. Castle Credit Corporation, Inc.*, 602 F.2d 538, 543 (3d Cir. 1979) (applying Pennsylvania law).

Appellants do not dispute that the Bank provided the funds for the First Mortgage loan and held the First Mortgage promissory note.[9] The promissory

[9] Indeed, Appellants stated in their response to the Commission's petition to distribute damages that the "legally required and fair distribution for the...estimated just compensation is to pay Fulton Bank the amount of the remaining $232,000 mortgage obligation, as of the date of the condemnation, with the balance to be paid to" Appellants. (Appellants' Petition to Distribute Damgaes ¶2, R.R. at 66a.) The Bank argues here that this statement is a judicial admission, which estops Appellants from arguing now that the Bank was not entitled to the amount owed by **(Footnote continued on next page…)**

note makes clear that Appellants borrowed $232,000 from the Bank and the mortgage payments were owed to the Bank. (Fixed/Adjustable Rate Note p. 1, R.R. at 242a.) MERS is not mentioned in the promissory note. The First Mortgage security instrument provides that, in addition to the mortgage payments, the Bank is also entitled to "the performance of [Appellants'] covenants and agreements," such as the payment of taxes and mortgage insurance premiums. (First Mortgage Instrument pp. 3, 5, R.R. 136a, 138a.) The security instrument also authorizes the Bank to protect its interests in the Property, including by intervening in a condemnation proceeding. (*Id*. pp. 3, 8, R.R. at 136a, 141a.)

MERS, on the other hand, is defined in the security instrument as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." (*Id*. p. 1, R.R. at 134a.) The security instrument further provides MERS with the authority to act in place of the Bank:

> MERS holds only legal title to the interests granted by [Appellants] under the Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

(*Id*. p. 3, R.R. at 136a.)

(continued…)

Appellants on the First Mortgage. Appellants' statement at issue here was neither made in a pleading as defined in the Rule of Civil Procedure No. 1007(a) or a like document nor was it made for Appellants' advantage. Thus, this statement does not have the preclusive effect of a judicial admission. *Lower Mount Bethel Township v. North River Company, LLC*, 41 A.3d 156, 162 (Pa. Cmwlth. 2012).

Thus, by the terms of the First Mortgage instrument, MERS is given authority to exercise all of the rights of the Bank as "necessary to comply with law and custom" but is also constrained to act "solely as a nominee" for the Bank. (*Id*.) A "nominee" is defined as a "person designated to act in place of another, usually in a very limited way" or a "party who holds bare legal title for the benefit of" another. Black's Law Dictionary 1149 (9th ed. 2009). MERS fits within both of these definitions: as an agent given the authority to act on behalf of the Bank and also as a straw-man legal owner of the mortgage for the Bank.[10]

Looking at the First Mortgage as a whole, it is clear that the Bank holds the First Mortgage promissory note and is the real party in interest in the First Mortgage. Appellants' argument that MERS is the appropriate party to assert an interest in the First Mortgage because of its status as "mortgagee" ignores the economic realities of the transaction. While MERS holds legal title to the First Mortgage, the security instrument makes clear that it does so solely "for the benefit of" the Bank, and the benefit of legal title of a mortgage is the security interest in the mortgaged property.

Whatever power and authority that belonged to MERS was entirely based upon its status as the nominee for the Bank. There is no indication in the record that MERS had followed the progress of the First Mortgage or was made aware of the taking of the Property. Hence, to allow Appellants to escape their debt from the First Mortgage because MERS did not assert a claim in the Trial

[10] These functions align with MERS' position in the mortgage industry. MERS, which was created by an industry trade group, remains the nominal holder of the mortgage in the public recording system, unless the note is transferred on the secondary market to a non-MERS member at which point the mortgage is assigned to the non-member. R. Item 32, Pesavento Aff. ¶¶7, 8; *Montgomery County, Pennsylvania v. MERSCORP, Inc.*, 904 F. Supp. 2d 436, 440-41 (E.D. Pa. 2012).

Court would bring about just the sort of inequitable result that equitable liens are designed to avoid. *See Gladowski v. Felczak*, 346 Pa. 660, 664, 31 A.2d 718, 720 (1943); *London Towne Homeowners Association v. Karr*, 866 A.2d 447, 451 n.9 (Pa. Cmwlth. 2004).

Accordingly, we hold that the Bank properly intervened in this action in order to assert its interests as a holder of an equitable lien in the just compensation paid by the Commission, regardless of MERS' status as "mortgagee" under the First Mortgage.

For the foregoing reasons, we affirm the order of the trial court.

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JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by the Pennsylvania Turnpike Commission of Property Located in Londonderry Township, Dauphin County, Commonwealth of Pennsylvania, for the Swatara Creek Bridge Replacement Project, MP 250 to 251.8 of the Pennsylvania Turnpike (Parcel No. 34-5-70-0-0)	:	
	:	No. 2015 C.D. 2012
Craig L. Bostdorf and Cynthia Rose Bostdorf, Appellants	:	
v.	:	
Pennsylvania Turnpike Commission	:	

O R D E R

AND NOW, this 2nd day of August, 2013, the order of the Dauphin County Court of Common Pleas in the above-captioned matter is hereby AFFIRMED.

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JAMES GARDNER COLINS, Senior Judge