1-31-1977

Burrell Registration Co. v. McKelvey

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27292

BURRELL REGISTRATION COMPANY, et al,

Plaintiffs-Appellants,

vs.

EDWIN L. MCKELVEY, et al,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR THE COUNTY OF LA PLATA

THE HONORABLE FREDERIC B. EMIGH
District Judge

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Does a statutory process of foreclosure of a person's property which does not provide the owner any notice or opportunity to be heard on the proprietory of the foreclosure or the foreclosure procedure, violate the due process of law provisions of the Colorado and United States Constitution?

II. Is a property owner deprived of his property without due process of law when statutory provisions granting a right to cure a default are not complied with?

III. Did the District Court err in sustaining defendants objection to plaintiff's testimony of the Court's ruling of the scope of a prior Rule 120 hearing?

IV. Did the District Court err by failing to award damages to Plaintiff based on the wrongful foreclosure?

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Appellants (hereinafter referred to as Plaintiff or Burrell) filed a Complaint and Motion for Preliminary Injunction on October 21, 1974 in an attempt to stop a Public Trustees sale of Plaintiff's property set for October 23, 1974. Appellees (hereinafter referred to as Defendants or Lawlers) were not in Colorado for service of process and Burrell did not have sufficient liquid assets to post bond for an exparte order to enjoin the sale. On January 16, 1975, Plaintiff filed an Amended Complaint seeking an Order declaring the sale null and void and restoring plaintiff to the property, or, in the alternative, awarding Plaintiff damages for the wrongful foreclosure. On Motion for Summary Judgment by all parties the Court found that the propriety of interest charged and the reasonableness of attorneys fees raised issues of fact. By Order of August 28, 1975 the Court found the Colorado statutes governing Public Trustee foreclosure not to be constitutionally invalid. Following trial to the Court on August 29, 1975 Judgment and Decree was entered on February 9, 1976. The Court entered stay of execution pending appeal.

B. STATEMENT OF FACTS

The facts, as found by the District Court, are stated in the first thirteen (13) paragraphs of the Judgment and Decree. In summary, Burrell was debtor on an assumed promissory note due Lawlers secured by a deed of trust encumbering Burrell's property. Lawlers declared the note in default on September 5, 1974 and filed written Notice of

Election and Demand for Sale with Edwin L. McKelvey, the Public Trustee for La Plata County (hereafter referred to as McKelvey). On September 17, 1974, Burrell's attorney gave written notice of intent to cure and requested the amount required to cure. One month later and only 5 days before sale McKelvey answered the request by letter of October 17, 1974, enclosing Lawlers' attorney's letter of October 14, 1974 setting forth the amounts required to cure if, in fact, the default was curable. No cure was made prior to sale and Lawlers entered the only bid at the Public Trustee sale. There was no redemption following the sale. Public Trustee's Deed was issued to Lawlers on May 27, 1975.

APPLICABLE STATUTES AND RULES

In Colorado, foreclosure pursuant to a power of sale contained in a deed of trust is controlled by statute. In 1974, the time of the events in this case, foreclosures were initiated by a Notice of Election of Demand for Sale filed by the creditor with the Public Trustee. 1963 C.R.S. 118-3-13(1). Article 3 of Chapter 118 of the 1963 Colorado Revised Statutes as amended provided for the Public Trustee to record the notice, advertise the property for sale and mail a copy of the notice to the debtor-owner and all other persons with a record interest in the property. Usually the creditor arranged a pro forma court hearing pursuant to Rule 120 C.R.C.P. to comply with the Soldiers and Sailors Relief Act and perfect title. Prior to the August 19, 1976 amendment of Rule 120 there was no notice to the land-owner debtor that he had any right to contest any allegations of default. To this day there is no legislative provision for a hearing on the allegations of default.

1963 C.R.S. 118-9-18, passed by the 1969 legialature allowed debtors the right to cure defaults in note payments by deposit of the delinquent installments plus costs with the Public Trustee prior to sale. The section requires the Public Trustee to determine the amounts necessary to cure the default by inquiring of the creditor and notifying the debtor.

SUMMARY OF ARGUMENT

I. THE COLORADO STATUTORY PROCEDURE GOVERNING PUBLIC TRUSTEE FORECLOSURES DENIES THE DEBTOR/OWNER DUE PROCESS OF LAW AS GUARANTEED BY THE COLORADO AND UNITED STATES CONSTITUTIONS.

A. PUBLIC TRUSTEE FORECLOSURE CONSTITUTES STATE ACTION.

B. FORECLOSURE IS A DEPRIVATION OF A PROPERTY INTEREST.

C. THE STATUTORY PROCEDURE PROVIDES NO HEARING IN WHICH THE DEBTOR/OWNER MAY BE HEARD.

D. THERE IS NO PROVISION FOR NOTICE TO THE DEBTOR/OWNER OF HIS RIGHT TO BE HEARD.

II. ACTIONS OF THE PUBLIC TRUSTEE AND CREDITOR WHICH DENY THE DEBTOR/OWNER HIS STATUTORY RIGHT TO CURE AMOUNT TO DEPRIVATION OF PROPERTY BY UNCONSTITUTIONAL APPLICATION OF LAW.

A. THE RIGHT OF A DEBTOR/OWNER TO FILE SUIT TO ENJOIN SALE OR FOR DAMAGES DOES NOT CONSTITUTE A CONSTITUTIONALLY ADEQUATE OPPORTUNITY TO BE HEARD.

III. THE DISTRICT COURT ERRED IN NOT ALLOWING PLAINTIFF TO TESTIFY ABOUT A PRIOR RULE 120 HEARING WHERE HE WAS NOT ALLOWED TO CONTEST ALLEGATIONS OF DEFAULT.

A. PLAINTIFFS STATE OF MIND IS RELEVANT TO HIS NON-APPEARANCE AT THE RULE 120 HEARING IN THIS CASE.

IV. THE DISTRICT COURT ERRED BY NOT AWARDING DAMAGES WHEN THE EVIDENCE SHOWED THE VALUE OF LOSS BY WRONGFUL FORECLOSURE.

A. A LAND OWNER IS QUALIFIED TO TESTIFY AS TO ITS VALUE.

I. THE COLORADO STUTATORY PROCEDURE GOVERNING PUBLIC TRUSTEE FORECLOSURES DENIES THE DEBTOR/OWNER DUE PROCESS OF LAW AS GUARANTEED BY THE COLORADO AND UNITED STATES CONSTITUTIONS.

This Court has been asked to declare the Colorado Public Trustee statutory foreclosure procedure unconstitutional in two recent cases, Patterson v. Serafini, 532 Colo. 965, 532 P. 2d 965 (1974) and Princeville Corp. v Brooks, _____ Colo. _____ 533 P. 2d 916 (1975). Although deciding on other grounds it appears by the Courts dicta in Princeville that if the constitutional question were faced it would be determined based on the following authority: North Georgia Finishing, Inc. v. Di Chem, Inc., 119, U.S. 601 (1975); Goss v Lopez, 419 U.S. 565 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed 2d 406 (1974); Fuentes v. Shevin, 407 U.S. 67, 92S. Ct. 1983, 32 L. Ed. 2d 556 (1972); Sniadach v. Family Finance Corp, 395 U.S. 337, 89S Ct 1820, 23 L. Ed 2d 349 (1969). A number of states have already reviewed their summary mortgage foreclosure procedure in light of some or all of this authority. See Current Developments in Summary Foreclosure, 9 Real Property, Probate and Trust Journal 421.

The instant case is particularly suited to a head-on determination of the constitutional issue. Complaint and Motion for Preliminary Injunction were filed prior to the Public Trustee sale alleging errors in the proceedings but no relief was available because service was impossible on the out of state creditors and plaintiff was unable to post a bond for an ex parte order. The Public Trustee was informed by letter the day after the sale that the procedure was improper but he didn't do anything

about it. Amended Complaint was filed after the sale on January, 1975 specifically alleging in the Fifth Claim For Relief that the Colorado Public Trustee foreclosure procedure constituted an unconstitutional deprivation of property without due process of law. Defendants specifically denied the allegation of unconstitutionality. The issue was joined. The Pre Trial Order of July 15, 1975, listed the first issue to be determined as follows:

> 1. Are the statutes governing foreclosure of deeds of trust by the Public Trustee, particularly Sections 38-37-113, 38-39-117 and 38-39-118, unconstitutional as being in violation of the due process clause of the 14th Amendment to the U. S. Constitution and the due process clause of the Colorado Constitution, Article II, Section 25? (Note: Section references are to 1973 Colorado revised Statutes).

By Order of August 28, 1975, the day prior to trial, the Court ruled that the foreclosure procedures were not in violation of the U.S. and Colorado Constitutions. It is this conclusion of law that plaintiffs deem error and appeal to this Court to reverse.

A. PUBLIC TRUSTEE FORECLOSURE CONSTITUTES STATE ACTION.

The Fourteenth Amendment to the United States Constitution is concerned with action of the state and such "state action" is necessary if a violation of that Amendment is to be found. No question was raised at the trial court of the existence of state action here, since it is quite clear that the state's involvement in deed of trust foreclosures meets the test that the state must "foster and encourage" the challenged conduct. Moose Lodge No. 107 v. Irvin, 407 U.S. 163 (1972). The involvement of the state in other summary creditor's remedies cases (where such involvement was not as total and encompassing as in this

case was so obvious as never to be discussed. Fuentes v. Shevin, 407 U.S. 254 (1970) (replevin); Sniadach v. Family Finance Corp. 395 U.S. 337 (1969) (wage garnishment). Additionally, Plaintiffs point out that under the due process clause of the Colorado Constitution, Colo. Const. Art II, § 25, there appears to be no requirement of state action at all. See Jenks v. Stump, 41 Colo. 281, 93 P. 17 (1907).

In any event, there can be no doubt that the requirement of state actio n embodied in the Federal constitution is satisfied in this case as indicated by the following state involvement: (1) the state statute regulates the whole foreclosure procedure; (2) the public trustee, an official of the County of La Plata, performs all the acts necessary to effectuate the deprivation of property including (a) advertising and giving notice of the sale, (b) conducting the sale, and (c) subsequently issuing a public trustee's deed to the purchaser; and (3) the state court held a hearing (old Rule 120, C.R.C.P.). The only action taken by the private creditor is the filing of the notice of election and demand for sale 73 C.R.S. 38-37-113, which initiates the process of sale by the public trustee. That action of the creditor is identical to the action of a creditor in seeking a writ of replevin--after filing the initial papers, the state takes over. As noted, there was no question of state action in replevin procedures. Fuentes v. Shevin, supra.

B. FORECLOSURE IS A DEPRIVATION OF A PROPERTY INTEREST

Colorado follows the "lien" theory of real estate mortgages. Title to the property rests in the landowner. Certainly a Public Trustee

foreclosure and sale of the property to a third party is a deprivation of property.

The recent line of U.S. Supreme Court cases based on Fuentes have determined that even a temporary deprivation requires the protection of procedural due process. Due Process Evolution - Fuentes and the Deed of Trust, 26 Southwestern Law Journal 877 (1972); Power of Sale Foreclosure after Fuentes, 40 University of Chicago Law Review 206 (1972).

C. THE STATUTORY PROCEDURE PROVIDES NO HEARING IN WHICH THE DEBTOR/OWNER MAY BE HEARD.

The premise that property interests entitled to due process protection cannot be taken without providing notice of the proposed action and an opportunity to be heard on the propriety of that action is so well settled that no citation of authority is required. At no point in Articles 3 and 9 of Chapter 118, C.R.S. - 1963 (now Articles 37 and 39 of Title 38, C.R.S. 1973) is there any provision for the grantor or obligor of a deed of trust to obtain a hearing as to the validity or propriety of the foreclosure procedure.

The only hearing in Colorado procedure relative to deeds of trust is a hearing pursuant to Rule 120, C.R.C.P. Prior to August 19, 1976 the sole intrinsic purpose of the Rule 120 hearing was to determine whether the debtors were in the military service (such a determination being necessary for marketability of title under the Soldiers' and Sailors' Civil Relief Act, 50 App. U.S.C.A. Sec. 532 (3). For many years the hearing was considered "in no sense an adversary proceeding". Hastings v. Security Thrift and Mortgage Co., 145 Colo. 36, 38, 357 P. 2d 919, 921

(1960). The March, 1975 case of Princeville Corp. v. Brooks, supra, held that "a Rule 120 hearing may be used to determine, if the circumstances warrant, whether there are factors in addition to military status which require the court to retain a supervising jurisdiction". The Rule 120 hearing in this case was held on October 17, 1974, and the Court felt bound by the Hastings v Security Thrift and Mortgage Co. case.

Hal Tudor and Bruce Nelson raise an interesting question in their January, 1977 Colorado Lawyer article; C.R.C.P. Rule 120: Understanding the Revision:

> "Whether the revised Rule meets its objective is, of course, now unknown. There is, however, a troubling aspect with having Rule 120 suffice for a hearing which may be constitutionally required. That aspect is that those provisions of the Colorado Revised Statutes governing public trustee foreclosures have not and still do not require a hearing as part of the procedure. Arguably, if marketability of title with regard to the Soldiers and Sailors Civil Relief Act as amended is not a concern, a public trustee could be required to sell the subject property at foreclosure without an order of a district court authorizing sale under Rule 120. If the assumption is that a hearing is constitutionally required, it would perhaps be appropriate to amend the Colorado Revised Statutes to make the hearing required as part of the public trustee foreclosure procedure itself."

Under the existing statutory procedure, presumably a writ of mandamus would issue to order a public trustee to conduct a foreclosure sale irrespective of any Rule 120 hearing. Because the legislature won't take the hint from this Court we may still not have a suitable hearing to protect the debtor. Certainly in this case there was no such opportunity to be heard to contradict the allegations of default.

D. THERE IS NO PROVISION FOR NOTICE TO THE DEBTOR/ OWNER OF HIS RIGHT TO BE HEARD.

In Mullane v Central Hanover Bank & Trust, 339 U.S. 306 (1950), the U. S. Supreme Court said the minimum that due process requires is that notice and an opportunity for hearing appropriate to the nature of each case must be undertaken and that the means employed to inform parties of a proceeding in which due process is required must be such as one who desires to actually inform the absentee might reasonably adopt to accomplish it. Although we have already established that there was no statutory hearing provided, Defendants would argue that the foreclosure notice sent by the Public Trustee and the notice of Rule 120 hearing sent by the court clerk were adequate to advise Plaintiff that his rights were being affected and he should appear if he was aggrieved. This is not constitutionally sufficient.

To be constitutionally sufficient, "notice" must be such notice as to inform a person of his opportunity to be heard. Notice is related to the opportunity to be heard. And a statutory notice is inadequate if it does not notify a person of this opportunity. Goldberg v. Kelley, 397 U.S. 254 (1970), Mullane v. Central Hanover Bank and Trust Co., supra at 314; As the Court said in Mullane:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 339 U.S. at 314 (emphasis supplied)

The Court in Fuentes v. Shevin, supra, also pointed out the interrelation of notice and hearing:

> 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified'. (citation omitted)
> 407 U.S. at 80

The notice sent out by the public trustee pursuant to Section 118-3-13 (2) is nothing more than a notice of impending doom. Without a related hearing, the notice is meaningless. This notice is no more valuable in a constitutional sense than the notice to a debtor that his household goods have been seized (Fuentes v. Shevin, supra,) or that his wages have been garnished (Sniadach v. Family Finance, supra). Goldberg v. Kelly, supra is directly on point and establishes the constitutional invalidity of such "notice of impending doom". In Goldberg v. Kelly, supra, a welfare recipient received a notice that a determination had been made that his welfare assistance was to be terminated in seven days. The notice informed the recipient that, if the recipient so requested, a higher official would review the record. The welfare department did not, however, permit the recipient to make an appearance. The Court held that no meaningful opportunity to be heard existed and that the entire procedure violated the requirements of due process of law. The seven day notice, absent an opportunity to be heard, was meaningless. The notice provided for by Section 118-3-13 (2) is no less meaningless in the constitutional sense.

II. ACTIONS OF THE PUBLIC TRUSTEE AND CREDITOR WHICH DENY THE DEBTOR/OWNER HIS STATUTORY RIGHT TO CURE AMOUNT TO DEPRIVATION OF PROPERTY BY UNCONSTITUTIONAL APPLICATION OF LAW.

The second issue set forth in the lower courts Pre-Trial Order of

July 16, 1975 was as follows:

> 2. If the statutes cited in Number 1 above, are Constitutional in the abstract sense, were the said statutes applied in a Constitutional manner so that Plaintiff was not deprived of his property without due process of law?

The trial Court made three very important findings which should have been determinative of that issue. First, the Court found that Lawler's attorneys fees of $10,400 included in the cure figure tendered to the Public Trustee and included in the foreclosure sale price were unreasonable and should have been no more than $4,000.00. Second, the Court found that the creditors statement of the interest due on default which was included in the cure figure and sales price was approximately $6,000.00 overstated. Third, the Court found that Lawler and the public trustee failed to comply with Section 38-39-118 C.R.S '73 when they notified Plaintiff that the default was not curable by the payment of money. Plaintiffs should have had the right to cure under the ruling of Foster Lumber Company v. Weston, _____ Colo. App. _____, 521 P. 2d 1294 (1974). By these findings entered on February 9, 1976 the trial Court affirmed what Plaintiffs had alleged as early as October 24, 1974, the day after sale, by letter to the Public Trustee; and alleged again on January 16, 1975 by the First, Third and Fourth Claims for Relief of the Amended Complaint.

The trial Court did well as far as it went, but it did not go far enough. After making the findings of fact which should have applied to the foreclosure eighteen months earlier, the Court still did not invalidate the sale and return Burrell to his property but rather put him in the untenable position of belatedly curing the default without use of the property.

The court missed the point that by the improper foreclosure procedures the plaintiff had been unconstitutionally deprived of the use of his property.

A. THE RIGHT OF A DEBTOR/OWNER TO FILE SUIT TO ENJOIN SALE OR FOR DAMAGES DOES NOT CONSTITUTE A CONSTITUTIONALLY ADEQUATE OPPORTUNITY TO BE HEARD.

This entire foreclosure proceeding and the prejudicial errors in allegations of default were brought before the Court and recognized only after affirmative action was taken by the debtor to regain the use of his property. The approach is entirely backward. Regardless of when the deprivation of property occurs, any procedure which requires a person whose property is to be taken to institute a separate proceeding to prevent that taking is constitutionally inadequate. In Jenks v. Stump, 41 Colo 281, 93 P 17 (1907) for example, the Colorado Supreme Court noted the ability of the property owner to initiate his own action, yet still found a deprivation of due process. The state, through the public trustee, in depriving Plaintiffs of property, cannot place the burden on Plaintiffs to prevent the taking.

The basic constitutional defect in requiring Plaintiffs to institute suit is that it shifts the burden of proof from the state and the creditor--the "takers"--to the Plaintiff. Such shifting of the burden of proof is itself a denial of due process. Armstrong v. Manzo, 380 U.S. 545 (1965) is directly in point. In Armstrong a natural father had no notice of proceedings for adoption of his daughter by his ex-wife's current husband. The natural father, upon learning of the adoption decree, moved to vacate the decree, and a hearing was held on this motion. The Supreme Court firmly rejected the notion that the failure to give the father prior

notice and an opportunity to be heard was cured by the hearing on the motion to vacate the decree. The Court held that this hearing did not satisfy the constitutional requirements of a hearing "in a meaningful manner" because it involved a shift in the burden of proof on the factual issue involved (whether the father had failed to support the child). The Court noted that "...where the burden of proof lies may be decisive of the outcome". 380 U.S. at 551.

If Plaintiffs were provided a hearing prior to the taking, the creditor, as in any action on a debt, would have the burden of proof that Plaintiffs were in default. If neither side offered any evidence, Plaintiffs would prevail. But if Plaintiffs, the alleged debtors, were required to institute suit they would have had the burden of proving they were not in default. This is a burden they would not have placed upon them if they were afforded a hearing in accordance with due process.

In Blount v. Rizzi, 400 U.S. 410 (1971) the Supreme Court held insufficient a procedure by which a person could challenge a determination by the post office that his mailings were obscene. Holding that, where the First Amendment is involved a judicial determination must be made, the court found it to be constitutionally inadequate for the distributor of the materials to initiate judicial proceedings, since he "must assume the burden of instituting judicial proceedings and of persuading the courts...". 400 U.S. at 418.

In Swarb v. Lennox, 314 F. Supp. 1091 (E D. Pa. 1970), aff'd 405 U.S. 191 (1972) the Court focused on the shift of burdens of instituting proceedings and concluded that a hearing available at the debtor's institu-

tion could not cure the due process defects in a confession of judgment procedure:

> The most striking feature of this latter petition (to strike the judgment) is that the burden of proof is placed upon the debtor who is considered the proponent of a claim and who must convince the court of the need of equitable relief... The placing of this burden upon the debtor is in direct contrast to the burdens in a normal or prejudgment creditor-debtor action. In those cases instituted by a creditor against a debtor, the creditor is considered the proponent of a claim and the burdens are his. 314 F. Supp. at 1094-95.

Again, the point is clear. The state, through its statutory foreclosure procedure, gives to creditors the ability to collect alleged debts without any proof of actual indebtedness. The creditor, while actually being the proponent of the action, is given all the advantages of defense. Certainly this court would not condone a criminal procedure whereby the defendant had the burden of proving his innocence. While the burden of proof in criminal cases is different in degree, it is still fundamental to our system of due process in both criminal and civil case that the proponent of an affirmative issue of fact has the burden of establishing that fact. Seaton Co. v. Idaho Springs Co., 49 Colo. 122, 111 P. 834 (1910). It is no more proper to force Plaintiffs to prove their freedom from default than it is to force a criminal defendant to prove his freedom from guilt.

In United States v. Wiseman, 445 F. 2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967 (1971) it was specifically held that such a shift of the burden of proof in a creditor-debtor case denied the debtor due process of law. In Wiseman, defendants were prosecuted for depriving people of

their rights to due process by wilfully filing false returns of service in civil cases in New York City's Civil Court. The Court held that those debtors who had default judgments taken against them were denied their federal constitutional rights in that they received no notice and, after judgment, the burden was placed on the debtors to seek further relief. 445 F. 2d at 797. In a similar prosecution in New York, the district court found that civil action defendants were denied due process even though they could move to vacate the default judgments taken against them. United States v. Barr, 295 F. Supp 889 (S.D.N.Y. 1969). The right to move to vacate did not cure the due process denial, the court said, because (1) the motion may be denied, and (2) the defendant would have the burden of proof to show he was not served. 295 F. Supp. at 892. It is clear from these decisions that the possibility that a person who has been denied due process of law may file a separate suit does not meet constitutional safeguards.

The decision in United States v. Barr, supra, points out that any subsequent relief requested by the debtor may be denied, and that there is thus a deprivation of due process rights. This point raises another inadequacy inherent in Plaintiffs' filing of a separate suit; Plaintiffs would have to seek the extraordinary relief of preliminary and permanent injunctions. Where the owner initiates an action, prior to sale, he must obtain preliminary injunctive relief to prevent the sale from occurring before the merits of the dispute are judicially determined. However, the granting of extraordinary relief is in the discretion of the trial court Spickerman v. Sproul, 138 Colo. 13, 328 P. 2d87(Colo. 1958) any discretionary relief cannot be considered a substitute for due process

of law. In Roller v. Holly, 176 U.S. 398 (1900) a defendant was denied due process when notice of a proceeding did not allow sufficient time for him to make an appearance. The Court said:

> "Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion -- a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." 176 U.S. at 409.

This point was again made by the Supreme Court in Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915). In Coe, the shareholder of a corporation had an execution issued against his property to pay the debt of the corporation. There was no notice at the time of the execution. However, a procedure embodied in the statute provided that the shareholder could post a bond and move to contest the legality of the execution The Supreme Court rejected this procedure in that it failed to comply with due process. The Court said:

> "Nor can... a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires." 237 U.S. at 424.

Again in Coe, the Court states:

> "It is not enough that the owners (shareholders) may be chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." (citation omitted). 237 U.S. at 424-25 (emphasis added).

If Plaintiffs had incurred the costs of a bond for an injunction

they would have been making a substitution--in exchange for the return of the unfettered use and alienability of their property they would substitute a bond and court costs. This is like the bond a debtor could post to obtain the return of his property in the replevin procedure in Fuentes v. Shevin, supra. Such a bond procedure did not cure the due process deprivation involved in the taking. The Court there said.

> "When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision." 407 U.S. at 85.

In sum, Plaintiffs ability to file a separate suit to enjoin the sale does not cure the due process deprivations inflicted upon them because: (1) they were denied property and due process at the moment the notice of election and demand was filed--any subsequent suit would be too late to stop that deprivation; (2) an independent suit would involve an unconstitutional shift in the burden of proof from the creditor to the debtor; (3) any such suit requires discretion of the court, and the right to a hearing cannot depend on discretion or chance; (4) the due process hearing must be given to Plaintiffs by the law, not by chance, discretion or even their own initiative; (5) such a suit is unduly burdensome; and (6) an independent suit requires the giving up of property in exchange for property already taken, and such an exchange is no less a denial of due process than the taking itself.

III. THE DISTRICT COURT ERRED IN NOT ALLOWING PLAINTIFF TO TESTIFY ABOUT A PRIOR RULE 120 HEARING WHERE HE WAS NOT ALLOWED TO CONTEST ALLEGATIONS OF DEFAULT

It is sometimes relevant to prove why a person acted the way he did. At trial transcript folio 133 to 142 the trial Court sustained Defendant's objection to questioning directed to Plaintiff Burrell to establish how his state of mind was influenced by his appearance at a prior unrelated Rule 120 hearing. The evidence would have shown, as set forth in the offer of proof, that Burrell was informed by Judge Emigh at a prior Rule 120 hearing on August 16, 1974 that it was solely for the purposes of determining if anyone was in the military service. Burrell was told that he could not contest any of the allegations of default. The Court relied on the ruling of Hastings v. Security Thrift & Mortgage Co., supra. The testimony was crucial to establish the plaintiff's impression that a Rule 120 hearing was only to determine who was in the military.

A witness can testify as to his state of mind on a previous occasion. He can testify as to communications received as long as they are not meant for assertive or testimonial use. State of mind testimony is sometimes considered an exception to the hearsay rule. This Court reviewed the exception in Davis v. Bonebroke, 135 Colo. 506, 313 P. 2d 982 (1957) and cited additional authority in Alexander Film Company v. Industrial Commission of Colorado, 136 Colo. 486, 319 P. 2d 1074.

A. PLAINTIFF'S STATE OF MIND IS RELEVANT TO HIS NON-APPEARANCE AT THE RULE 120 HEARING IN THIS CASE.

Had Plaintiff's testimony been allowed to show that he did not appear at the October 17, 1974 Rule 120 hearing because he thought the

Court would not hear him then we don't have a Princeville type situation. It means there was no opportunity for Plaintiff to be heard. It means that there was no forum provided for Plaintiff to point out the errors the Court has delineated in the Judgment and Decree. It means that Lawler and Public Trustee were able to take the property as they chose. Certainly Plaintiff's state of mind is relevant to why he received no hearing whatsoever in this case.

IV. THE DISTRICT COURT ERRED BY NOT AWARDING DAMAGES WHEN THE EVIDENCE SHOWED THE VALUE OF LOSS BY WRONGFUL FORECLOSURE

The trial Court recognized at the end of trial on August 29, 1975 that if the foreclosure procedures were found improper the alternatives were restoration of the Plaintiffs to their property or award of money damages (trial transcript ff 274-278). In Judgment and Decree of February 9, 1976 the court failed to restore Plaintiffs to their property but rather required them to make payment without being given use of the property. While failing to provide restoration and effectively depriving Plaintiff from their property the Court did not award damages as an alternative.

The Court record included the trial, all exhibits and the prior depositions. It was established by the exhibits and the testimony of Mr. Burrell and Mr. Lawler that the balance of the outstanding mortgage on the property was $97,900. This figure subtracted from the fair market value would be the loss to plaintiff by the deprivation of the property by defendants. If the time of the loss is considered to be when the foreclosure sale took place then the best evidence of the fair market value was

the said price of $117,039.95 (tt ff. 69-71). If the time of the loss is considered to be when the Notice of Election and Demand was recorded then the purchase price of $130,200 (tt. f. 163)would bear on the fair market value. No other appraisals of value were given by any witness.

A. A LAND OWNER IS QUALIFIED TO TESTIFY AS TO ITS VALUE

It has long been held that a property owner is a qualified witness to give an estimate of the value of his property. William E. Burrell testified that the balance owed on the mortgage against the property was $97,900.00 and his equity above that was $32,300. (tt. ff. 163-164).

Difficulty or uncertainty in ascertaining or measuring the precise amount of damages does not preclude recovery. See Peterson v. Colorado Potato Flake & Mfg. Co. 435 P. 2d 237 (Colo. 1967) Riggs v. McMurtry, 157 Colo. 33, 400 P. 2d 916 (1965); Donahue v. Pikes Peak Automobile Co. 150 Colo. 281, 372 P. 2d 443 (1962) and Colorado Nat'l Bank v. Ashcraft, 83 Colo. 136, 263 Pac 23 (1928)

CONCLUSION

If this Court finds that the Colorado statutory foreclosure procedure was constitutional in September of 1974 and finds that it was constitutionally applied to Burrell so as not to be a deprivation of property without due process of law, then no further action is necessary.

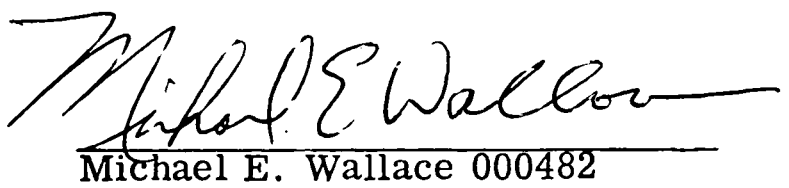
If, on the other hand, this Supreme Court finds the public trustee foreclosure procedure unconstitutional or unconstitutionally applied then Plaintiffs must be given some viable relief.

The most obvious relief would be to Order that Burrell be restored to his property as of September 5, 1974, the date Notice of Election and Demand for Sale was recorded. A proper hearing would need to be held to allow Plaintiff to challenge the allegations of default which the trial court has found were in error as a matter of fact.

As an alternative, this Court could Order that Plaintiff be given a reasonable opportunity to cure any default by use of the property to pay the cure figure set by the trial court.

Finally, if the Supreme Court decides to allow the foreclosure and Public Trustee Deed to stand, damages in the amount of $32,300.00 should be awarded to compensate for lost equity as a result of the improper foreclosure.

Respectfully submitted,



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