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Bakers Park Mining and Milling Co. v. District Court of County of Denver

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FILES IN THE
SUPREME COURT
OF THE STATE OF COLORADO

IN THE SUPREME COURT
FOR THE STATE OF COLORADO

NOV 3 1982

David W. Brooking

No. 82SA494

BAKERS PARK MINING & MILLING)	
COMPANY, a Colorado corporation,)	
)	<u>ORIGINAL PROCEEDING</u>
Petitioner,)	
)	
v.)	Civil Action No. 82-CV-7919
)	District Court
DISTRICT COURT IN AND FOR THE)	in and for the City and County
CITY AND COUNTY OF DENVER and)	of Denver
THE HONORABLE JOHN BROOKS, JR.,)	
a Judge of said Court,)	Honorable
)	John Brooks, Jr.,
Respondents.)	Judge

BRIEF IN SUPPORT OF PETITION FOR RELIEF IN THE NATURE OF
PROHIBITION AND MOTION FOR STAY

Petitioner, Bakers Park Mining & Milling Company, respectfully submits this Brief in Support of Petition for Relief in the Nature of Prohibition and Motion for Stay.

I. ISSUES PRESENTED FOR REVIEW.

1. Is the district court proceeding without or in excess of its jurisdiction in a rule 120 proceeding by considering what, if any, attorneys' fees are proper under the deed of trust being foreclosed, when the explicit provisions of Rule 120 prohibit the district court from determining issues such as this?

2. Is the district court's erroneous exercise of juris-

diction sufficiently serious and prejudicial to necessitate this court's exercise of its original jurisdiction?

II. STATEMENT OF THE CASE.

The allegations upon which petitioner relies in invoking the extraordinary authority of this court pursuant to Rule 21(a) of the Colorado Appellate Rules are set forth in its Petition for Relief in the Nature of Prohibition and Motion for Stay, filed simultaneously with this Brief. In summary, in June 1982, Tusco Incorporated ("Tusco"), a Nevada corporation, applied to the San Juan County District Court for an order under Rule 120 of the Colorado Rules of Civil Procedure, authorizing the public trustee of San Juan County to sell certain real estate under a power of sale contained in a deed of trust. Petitioner Bakers Park was the grantor of the deed of trust for the benefit of Tusco. After petitioner filed a verified response, the case was transferred to Denver, at the request of Tusco, where it was designated Civil Action No. 82-CV-7919 and assigned to the Honorable John Brooks, Jr.

On September 23, 1982, the district court held a hearing and found, in the language of Rule 120, that there was a "reasonable probability" of the "existence of a default. . . authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein. . . ." Accordingly, on September 24, 1982, the court signed an order authorizing sale. The court stated that its ruling did not preclude Bakers Park from starting a separate,

independent action seeking adjudication of issues which the court would not consider in the rule 120 proceeding. On October 1, 1982, Tusco moved for attorneys' fees in the rule 120 action, seeking \$300,000 in fees for the rule 120 proceeding, without instituting an independent action.

On October 18, 1982, Bakers Park commenced its separate, independent action by filing a Verified Complaint in Bakers Park Mining & Milling Company and Sundance Oil Co. v. Tusco Incorporated and Catherine E. Martinez, Public Trustee of the County of San Juan, Colorado, Case No. 82-CV-8674 in the District Court for the City and County of Denver. The Verified Complaint seeks, among other things, a complete adjudication of the parties' rights under the promissory note and deed of trust which were involved in the proceeding under Rule 120. In particular, paragraph 20 of the Verified Complaint alleges that "The [attorneys'] fees sought are wholly unreasonable" and paragraph 21 alleges that Bakers Park is entitled to a judgment declaring that "Tusco is not entitled to attorneys' fees under the deed of trust." In connection with the Verified Complaint, Bakers Park also filed a Motion for Preliminary Injunction and is seeking a permanent injunction. A hearing on the Motion for Preliminary Injunction is set to commence at 8:30 a.m. on Thursday, December 9, 1982 in another division of the Denver District Court.

A hearing on Tusco's motion for attorneys' fees in the rule 120 proceeding was scheduled to commence October 26, 1982. Before that hearing, Bakers Park moved to consolidate Tusco's motion

for attorneys' fees with Case No. 82-CV-8674 and to continue the hearing on the motion for attorneys' fees. In its motion, Bakers Park contended, among other things, that Rule 120 expressly prohibits consideration of attorneys' fees in a rule 120 proceeding. The district court, the Honorable John Brooks, Jr. presiding, decided that it had the power to decide the attorneys' fees dispute and began taking testimony on that issue. Since it was unable to conclude the hearing, the district court continued the hearing on attorneys' fees until November 12, 1982.

Petitioner believes that the decision of the district court to proceed with the determination of attorneys' fees clearly exceeds the scope of permissible issues which may be heard under the plain and unequivocal provisions of Colo. R. Civ. P. 120(d). Since there is no appeal of decisions under Colo. R. Civ. P. 120(d), petitioner must seek the assistance of this court at this time so that its basic rights may be protected and so that justice may be done.

III. SUMMARY OF ARGUMENT.

1. Rule 120(d) of the Colorado Rules of Civil Procedure provides for a hearing when a beneficiary of a deed of trust applies for a court order authorizing sale under a power of sale contained in a deed of trust. Colo. R. Civ. P. 120(d) provides that "The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale

contained therein, and such other issues of which consideration may be required by the Soldiers' and Sailors' Civil Relief Act of 1940." Notwithstanding the protests of petitioner that the district court in a rule 120 proceeding has absolutely no power to decide issues such as attorneys' fees recoverable under the deed of trust, the district court is proceeding to hear and determine the issue of attorneys' fees in an action commenced as a rule 120 proceeding. The district court is proceeding in direct contravention to the express limitations of Colo. R. Civ. P. 120(d) and is thus proceeding without or in excess of its jurisdiction.

2. Since any determination made under Colo. R. Civ. P. 120(d) is not appealable, it is necessary and proper that this court issue a writ, pursuant to Rule 21(a) of the Colorado Appellate Rules, prohibiting the district court from proceeding without authority to make a determination concerning attorneys' fees.

IV. ARGUMENT.

- A. BECAUSE THE DISTRICT COURT DOES NOT HAVE POWER, IN A RULE 120 PROCEEDING, TO CONSIDER ISSUES SUCH AS ATTORNEYS' FEES, THE RESPONDENT COURT IS PROCEEDING WITHOUT OR IN EXCESS OF ITS JURISDICTION.

Rule 120(d) of the Colorado Rules of Civil Procedure governs the scope of the hearing to be held when a party seeks an order authorizing a sale under a power of sale. Section (d) provides as follows:

(d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and the responses, if any, and shall hear such testimony as may be offered. The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues of which consideration may be required by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. The court shall determine whether there is a reasonable probability that such default or other circumstance has occurred, and whether an order authorizing sale is otherwise proper under said Soldiers' and Sailors' Civil Relief Act, as amended, and shall summarily grant or deny the order in accordance with such determination. Neither the granting nor the denial of a motion under this Rule shall constitute an appealable order or judgment; the granting of any such motion shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any right or remedy of the movant in the premises. (Emphasis added).

The prohibitory language expressly limits the scope of a hearing under Rule 120(d) to the issues of (1) whether a default exists, (2) whether other circumstances authorizing a sale exist, and (3) whether relief is proper under the Soldiers' and Sailors' Civil Relief Act of 1940. The plain language of the rule limits the court's jurisdiction to these three issues only. See Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724, 725 (Colo. App. 1981) (determination of priority of liens on property "is outside the scope of inquiry at a C.R.C.P. 120 hearing."); H. Tudor

& B. Nelson, C.R.C.P. 120: Understanding the Revision, 6 Colo. Law. 40, 46 (1977) ("The scope of the [rule 120] hearing is specifically restricted to [the] three [aforementioned] matters and no other issues may be considered.") (Emphasis added). This explicit limitation of issues appropriate for decision in a rule 120 hearing is underscored by the succeeding sentences of Rule 120(d). The court determines only whether there is a "reasonable probability" of a default or other circumstance authorizing sale. It is to rule "summarily" in accordance with its determination. Finally, the grant or denial of the order is not appealable.

The respondent court's decision to consider and rule upon attorneys' fees in a rule 120 proceeding is directly contrary not only to the rule's language but also to the rule's history and purpose. The original purpose of Rule 120 was solely to establish the status of the debtor with respect to military service in compliance with the Federal Soldiers' and Sailors' Civil Relief Act of 1940 (the "Relief Act"). The rule 120 proceeding was not adversarial and no motions or pleadings were permitted to be filed by anyone other than the person who sought the order authorizing the sale. Hastings v. Security Thrift & Mortgage Co., 145 Colo. 36, 38, 357 P.2d 919, 921 (1960).

In Princeville Corporation v. Brooks, 188 Colo. 37, 533 P.2d 916 (1975) (en banc), this court expanded the permissible scope of a rule 120 hearing "to comport with the modern trend to restrict ex parte taking of property without a hearing." 188 Colo. at 40,

533 P.2d at 918. Accordingly, the court held that, under appropriate circumstances, "a Rule 120 hearing may be used to determine. . . whether there are factors in addition to military status which require the court to retain a supervising jurisdiction." 188 Colo. at 40-41, 533 P.2d at 918.

Shortly after Princeville, the Colorado Supreme Court appointed a committee to revise Rule 120 to comport with the principles announced in Princeville. On August 19, 1976, the court repealed and reenacted Rule 120 in approximately the same form suggested by the committee. The new Rule 120, which became effective on October 1, 1976, provided augmented procedural safeguards to assure that due process was satisfied.

Rule 120 has never been intended as a catch-all for every issue which might arise in a foreclosure through the public trustee. Rather, it was designed as a relatively limited and quick summary proceeding with no right of appeal from the grant or denial of the order. The summary nature of the proceeding is necessary to preserve the advantages of foreclosure through the public trustee over foreclosure through the courts, while simultaneously complying with the Relief Act. The advantages of public trustee foreclosure -- avoidance of congested dockets, avoidance of delay, simplified and expedited procedure, and increased marketability of title which follow this expedited procedure (see 1 E. King, Colorado Practice § 279 [1970]) -- would be significantly diminished by the injection of issues extraneous to the questions

of default or compliance with the Relief Act. In fact, the Committee on Revision of Rule 120 considered a proposal that attorneys' fees should be dealt with by the Rule. The majority of the Committee rejected the proposal because it "felt that [the] issue was beyond the scope of the Rule." Legislative History: C.R.C.P. Rule 120, 8 Colo. Law. 785, 791 (1979) (memorandum from Royal C. Rubright, Chairman of the Committee on Revision of Rule 120 C.R.C.P.). Although the revised Rule 120 enabled the court additionally to consider whether a default had occurred, it was obviously never contemplated that the rule 120 hearing would be a mechanism to determine other issues, such as attorneys' fees, lien priorities, redemption priority, etc. The structural scheme under Rule 120 is simply not equipped to deal with the myriad of potential issues which could be presented under a deed of trust.

B. THE RESPONDENT COURT'S ERRONEOUS
EXERCISE OF JURISDICTION IS
SUFFICIENTLY SERIOUS AND PREJUDICIAL
TO NECESSITATE THIS COURT'S EXERCISE
OF ITS ORIGINAL JURISDICTION.

This court should exercise its original jurisdiction in this case to prevent prejudicial and irreparable injury to petitioner and to consider questions critical to the administration of public trustees' foreclosures in this state. As noted above, if the district court is allowed to determine the issue of attorneys' fees, its decision would not be appealable. The writ of prohibition is

designed for a case precisely like this. See, e.g., Vaughn v. District Court, 192 Colo. 348, 349, 559 P.2d 222, 223 (1977) (en banc). Acquiescing in the assumption of jurisdiction asserted here could have exceedingly deleterious ramifications upon the orderly administration of justice in this state by introducing a plethora of potential issues into rule 120 proceedings. Such collateral issues are best resolved in independent, full-blown adversarial actions from which appeals could be taken, if necessary.

V. CONCLUSION.

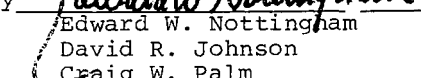
The respondent court has transgressed the bounds of its authority under Rule 120, in direct contravention of the language, history and purpose of the Rule. For the reasons discussed above, petitioner respectfully requests that this court prohibit the district court from taking any further action with respect to attorneys' fees in the rule 120 proceeding bearing Civil Action No. 82-CV-7919. In addition, if an Order to Show Cause issues, petitioner respectfully requests this court to stay the hearing on attorneys' fees scheduled for November 12, 1982.

Dated at Denver, Colorado this 3rd day of November, 1982.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of November, 1982, a true and correct copy of the foregoing Brief in Support of Petition for Relief in the Nature of Prohibition and Motion for Stay was deposited in the United States mail, postage prepaid, addressed as follows:

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