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

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IN THE SUPREME COURT  
FOR THE STATE OF COLORADO

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

No. 82SA494/

JAN 6 1983

David W. Brozina

BAKERS PARK MINING & MILLING )  
COMPANY, a Colorado corporation, )

Petitioner, )

v. )

DISTRICT COURT IN AND FOR THE )  
CITY AND COUNTY OF DENVER and )  
THE HONORABLE JOHN BROOKS, JR., )  
a Judge of said Court, )

Respondents. )

ORIGINAL PROCEEDING

Civil Action No. 82-CV-7919

District Court

in and for the City and  
County of Denver

Honorable  
John Brooks, Jr.,  
Judge

REPLY TO RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE

Petitioner, Bakers Park Mining and Milling Company,  
respectfully submits this Reply to Respondent's Answer to Order to  
Show Cause.

ARGUMENT

A. Respondent's Contention That the Deed of Trust Gives the  
District Court Jurisdiction to Decide the Issue of Attorneys'  
Fees Is Erroneous, Because It Confuses the Difference Between  
Foreclosure Through a Public Trustee and Foreclosure Through a  
Court

Respondent contends primarily that the Deed of Trust at  
issue in this case grants the rule 120 court authority to decide the  
issue of attorneys' fees. In its attempt to justify the rule 120

court's exercise of jurisdiction, respondent misconstrues the Deed of Trust and hopelessly confuses the difference between foreclosure through a public trustee and foreclosure through a court. Contrary to respondent's assertion, the foreclosure here was through the public trustee, not the court. In such a foreclosure, the Deed of Trust clearly does not grant a rule 120 court the power to award attorneys' fees.

The Deed of Trust (Exhibit A to Respondent's Answer to Order to Show Cause) plainly distinguishes between foreclosure through a public trustee and foreclosure through the courts. Paragraph 7 provides:

That in the event foreclosure is made by the Trustee, attorneys' fees for services in the supervision of said foreclosure proceedings in a reasonable amount shall be allowed by the Trustee as part of the cost of foreclosure. In the event foreclosure is made through the Court, attorneys' fees in the amount determined by the Court to be reasonable shall be taxed by the Court as part of the cost of such foreclosure proceedings. (Emphasis added.)

At the time the Deed of Trust was executed, the parties by this language recognized a distinction between foreclosures through the courts and foreclosures through the public trustee.<sup>1</sup>

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1. Without exception, the commentators also recognize and differentiate between judicial foreclosures and "power of sale" foreclosures through a public trustee. See, e.g., R. Kratovil & R. Werner, Modern Mortgage Law and Practice §§41.08 and 41.09 (2d ed. 1981); G. Osborne, G. Nelson and D. Whitman, Real Estate Finance Law §§7.11, 7.19 (1979).

Attempting to bring itself within the provision in the Deed of Trust authorizing a court to award attorneys' fees where foreclosure is through a court, respondent spends much of its answer in a convoluted effort to demonstrate that the foreclosure here is made "through the Court." In so doing, it ignores pleadings it filed in the rule 120 action and overlooks abundant statutory and judicial authority clarifying the distinction between the two types of foreclosure.

By its pleadings in the rule 120 action, Tusco sought a foreclosure through the public trustee. Tusco did not file an action to foreclose the deed of trust as a mortgage through the courts. Instead, Tusco filed a "Motion For Order Authorizing Sale" seeking a court "for order authorizing the Public Trustee . . . to sell certain real property." (Emphasis added). A copy of the Motion for Order Authorizing Sale is attached hereto as Exhibit A and adopted herein by reference. The plain intent of Tusco was to foreclose through the public trustee by virtue of the power of sale contained in the Deed of Trust.

Respondent seriously miscomprehends the whole statutory scheme of public trustee foreclosures when it contends that "[f]oreclosure may be made either by the Court (Rule 120) or the Public Trustee . . . depending on the property involved." (Respondent's Answer to Order to Show Cause at 4.) Respondent's argument amounts to the erroneous contention that merely because a court is required by Rule 120 and Colo. Rev. Stat. § 38-37-140 (1973)

to issue an order authorizing sale before a public trustee can sell the property pursuant to a power of sale, the proceeding is transformed into a judicial foreclosure. If respondent were correct, there would be no such thing as a "public trustee foreclosure," since every foreclosure through the public trustee entails some judicial involvement. There is absolutely no precedent for respondent's position, and exactly the opposite is true.

The Colorado Revised Statutes are replete with references which either expressly or impliedly indicate there is a significant difference between a foreclosure through the public trustee and foreclosure through the court. See Colo. Rev. Stat. § 38-37-101 (1973) ("Any deed of trust that names any other person [than the public trustee] as trustee therein shall be deemed and taken to be a mortgage and foreclosed only as mortgages are foreclosed in and through the courts."); Colo. Rev. Stat. § 38-37-140 (1973) ("In all cases of foreclosure of real estate by the public trustee pursuant to a power of sale contained in a deed of trust, the legal holder of the indebtedness secured thereby shall obtain an order authorizing sale from a court properly having jurisdiction to issue same."). The latter statutory provision, which deals with the requirement of obtaining an order authorizing sale via the rule 120 procedure, specifically refers to "foreclosure . . . by the public trustee."

The practical differences between a foreclosure through the courts and a foreclosure through the public trustee further underscore the conceptual and legal difference between the two forms

of foreclosure. A public trustee can only foreclose upon a deed of trust containing a power of sale. The absence of a power of sale clause in a mortgage, however, does not prevent judicial foreclosure. A judicial foreclosure is a plenary proceeding where the court maintains supervision and jurisdiction throughout the foreclosure, sale and disposition of the proceeds. On the other hand, a public trustee foreclosure is a quicker and a less expensive system of property foreclosure than a judicial foreclosure. Rule 120 merely provides a procedural mechanism to afford mortgagors with a summary hearing to comport with principles of due process and the Soldiers' and Sailors' Civil Relief Act of 1940. An order for judicial foreclosure is appealable, but a rule 120 order authorizing sale is not appealable. A separate, court-ordered deficiency judgment must be obtained by the beneficiary if he forecloses through the public trustee, since the only thing to which he is entitled is sale of the property. In a judicial foreclosure, no deficiency judgment need be obtained since the judgment obtained in the foreclosure proceeding can be a personal judgment against the debtor. Although there are other differences between the two types of foreclosure, it is abundantly clear that just because a court plays a limited role in public trustee foreclosures, this does not make every foreclosure a "judicial foreclosure" or a "foreclosure through the courts" as those terms are commonly used and understood.

Respondent's failure to recognize the difference between a judicial foreclosure and a "power of sale" foreclosure permeates its

entire response and infects all of its conclusions. For example, respondent cites and quotes cases which, according to respondent, stand for the proposition that "[p]revious Colorado cases have allowed the trial court in a foreclosure to decide the issue of a 'reasonable attorney fee.'" All of these cases are completely inapposite to the case at bar because they deal with instances of foreclosure through the courts. Denver Lumber & Manufacturing Co. v. Capitol Life Insurance Co., 96 Colo. 21, 39 P.2d 1036 (1934) involved a "suit to foreclose a real estate mortgage." A full trial was held and a number of contentions were raised on appeal. This case did not even involve a deed of trust or a public trustee.

Other cases cited by respondent are equally inapplicable. Ironically, it relies on Refining Co. v. Heald, 112 Colo. 113, 146 P.2d 992 (1944) (en banc). Heald, the beneficiary of a deed of trust, sought to foreclose the deed of trust "as a mortgage" through the court. 112 Colo. at 114. "Motions and demurrers were filed and overruled . . . Trial was to the court" and findings were entered in favor of the beneficiaries. 112 Colo. at 115. (Emphasis added.) Thus, Heald was a case where the beneficiary sought to foreclose the deed of trust as a mortgage through the courts.<sup>2</sup> Consequently, the fact that the court held a "special hearing" on the issue of

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2. "Deeds of trust executed to the Public Trustee may be foreclosed as mortgages by judicial proceedings." P. Morris, Foreclosure By Sale By Public Trustee of Deeds of Trust in Colorado, 28 Dicta 437, 438 (1951).

attorneys' fees is not surprising. The supreme court's discussion, however, emphasizes the difference between a judicial foreclosure and a public trustee's foreclosure:

Had this been a simple public trustee's foreclosure we question the reasonableness of these maximum fees. We realize that counsel's labor involved in this complicated judicial procedure justified a larger fee than should have been allowed had the foreclosure been by the public trustee.

112 Colo. at 116.

In addition to contending that the Deed of Trust at issue here authorizes the rule 120 court to decide the issue of attorneys' fees, respondent parades a number of imaginary horrors which might result were a public trustee to decide the issue of attorneys' fees. It contends, for example, that petitioner's position would permit the public trustee to set fees in every case and that this is beyond the powers of an administrative officer such as the public trustee. The authority to determine the amount of attorneys' fees when so provided in a deed of trust, however, appears to be within the trustee's statutorily granted powers.<sup>3</sup> See Colo. Rev. Stat. § 38-37-105 (1973) ("Public trustees named as trustees in deeds of trust shall perform

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3. As a practical matter, trustees very often determine the attorneys' fees to be included as part of the cost of sale pursuant to a deed of trust. The attorney foreclosing includes the fees in his schedule of costs to the public trustee. The public trustee then merely adds that to the amount due and owing. Often, the deed of trust will specify a fixed sum to which the mortgagee's attorney will be entitled as attorneys' fees in the event of foreclosure through the public trustee.



all the functions and exercise all the powers conferred upon them by deeds of trust.") (Emphasis added.)

Even if the public trustee does not have such authority, it does not follow that the rule 120 court does have such authority. Rule 120(d) contemplates that any party to a rule 120 proceeding may initiate other actions outside the rule 120 proceeding. Indeed, petitioner has done precisely that. (See Exhibit F to Petition for Relief in the Nature of Prohibition and Motion for Stay.) The question, then, is whether a decision on issues such as attorneys' fees will be made by the rule 120 court or whether it will be made by the court entertaining the separate, plenary action which is permitted by Rule 120 and from which an appeal clearly lies.

This question is easily answered by reference to the history, language and purpose of Rule 120. It is noteworthy that respondent does not seriously attack any of the authorities which petitioner cites in its initial brief, except to state that the authorities "are inapplicable and have no value in the instant controversy."<sup>4</sup> The failure to otherwise mention the authorities cited in petitioner's initial brief underscores and exposes the weakness of respondent's position. The fact of the matter is that

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4. Respondent suggests that Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724, 725 (Colo. App. 1981) is inapplicable to the determination of the present controversy. In that case the court stated that a determination of priorities of liens on the property would have been "outside the scope of inquiry at a C.R.C.P. 120 hearing." Such a statement is obviously relevant to the limitations of Rule 120.

the Committee on Revision of Rule 120 specifically considered a proposal that attorneys' fees should be dealt with by the rule and specifically rejected that proposal.<sup>5</sup> This was consistent with the Committee's conclusion that "Rule 120 proceedings are inherently unsuited to the resolution of numerous or complex issues." Legislative History: C.R.C.P. Rule 120, 8 Colo. Law. 785, 787 (1979) (memorandum from Royal C. Rubright, Chairman of the Committee on Revision of Rule 120, to then-Chief Justice Pringle). The committee felt that permitting issues not susceptible of summary disposition to be raised would "tend to emasculate the statutory public trustee foreclosure system." Id. This undesirable effect is precisely what could result if respondent's decision is approved. The Committee carefully drafted the language of the statute specifically and expressly to restrict the jurisdiction of the rule 120 tribunal to hear and decide only issues required by principles of due process and the Soldiers' and Sailors' Relief Act and specifically restricted the scope of the court's order to the determination of whether or not

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5. Respondent's oblique suggestion that the return of sale required by Rule 120(g) somehow gives the court continuing jurisdiction and power to hear the issue of attorneys' fees is misplaced and erroneous. The return of sale required by Rule 120(g) was in the older version of the Rule which prohibited any hearing except as to whether the Relief Act had been complied with. The return of sale was retained in the revised Rule 120 to satisfy the requirements of the Relief Act and not to extend the jurisdiction of the rule 120 court. See Legislative History: C.R.C.P. Rule 120, 8 Colo. Law. 785, 791 (1979) (supplemental memorandum from Royal C. Rubright, Chairman of the Committee on Revision of Rule 120, to then-Chief Justice Pringle).

there was a reasonable probability that a default had occurred and whether an order authorizing sale was proper under the Relief Act.<sup>6</sup> The strict limitations on the scope of Rule 120 are in accord with the Committee's intention to retain the summary nature of rule 120 proceedings. Allowing a rule 120 tribunal to hear and decide questions concerning attorneys' fees, lien priorities, etc. does not comport with the intention of the rule. If it is necessary to raise and decide such issues, this should be done in the separate plenary proceedings contemplated by Rule 120 itself. To permit the rule 120 proceeding to be cluttered with such issues would seriously undercut the purpose of the rule.

B. Rule 54(d) of the Colorado Rules of Civil Procedure, Concerning Costs, Does Not Give Respondent Court Jurisdiction to Award Attorneys' Fees

Respondent contends that Rule 54(d) of the Colorado Rules of Civil Procedure permits the court in a rule 120 proceeding to award attorneys' fees as costs. This argument suffers from two flaws. First, it depends upon the erroneous premise that "the foreclosure was pending through the Court." Respondent's Answer at 8. When foreclosure is through the court, paragraph 7 of the Deed of

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6. On page 3 of the Respondent's Answer, Respondent quotes the language of Rule 120(d) as follows: "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 expenses, if any, and shall hear such testimony as may be offered. . . ." (Emphasis added). The underscored word was misquoted by Respondent. The word should be "responses".

Trust (quoted in full earlier) permits the court to tax attorneys' fees "as part of the cost of such foreclosure proceedings." As previously noted, there can be no serious dispute that the foreclosure was not through the court but rather through the public trustee. Consequently, the language in the Deed of Trust upon which Respondent relies is simply inapplicable in this case.

A second flaw in respondent's argument is its assumption that the term "costs," as it is used in Rule 54, includes "attorneys' fees." There is no basis for the assumption. Attorney's fees are includable as costs only when they are authorized by statute or court rule. Colo. Rev. Stat. § 13-16-122(h) (1982 Supp.). Since there is no statute or court rule which applies here, the "costs" awardable under Rule 54(d) do not include attorneys' fees.

#### CONCLUSION

The history, plain language and purpose of Rule 120 all lead inexorably to one result: the Respondent District Court exceeded its jurisdiction when it ruled that it could hear and determine the issue of attorneys' fees in an action commenced as a rule 120 proceeding. All of respondent's arguments to the contrary are based on the faulty premise that this was a foreclosure through the courts. In fact, it was clearly a power of sale foreclosure through the public trustee.

Permitting a court to determine issues other than those specifically delineated in Rule 120(d) could seriously undermine the system of public trustee foreclosures in Colorado. The Committee on

the Revision of Rule 120 realized this and scrupulously drafted the rule to insure that the benefits of the public trustee foreclosure system would not crumble under the weight of additional issues which might be injected into the rule 120 proceeding. The Respondent District Court has acted in excess of its jurisdiction and must be prohibited from deciding the issue of attorneys' fees. For these reasons, the petition should be granted and the Rule to Show Cause should be made absolute.

Dated at Denver, Colorado this 6th day of January, 1983.

Respectfully submitted,

SHERMAN & HOWARD

By: 

By: 

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Company

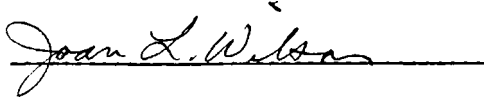
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1983, a true and correct copy of the foregoing REPLY TO RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE was deposited in the United States mails, postage prepaid, addressed to the following:

Clerk of the District Court  
City and County of Denver  
City and County Building  
1437 Bannock Street  
Denver, Colorado 80202

The Honorable John Brooks, Jr.  
District Court  
City and County of Denver  
City and County Building  
1437 Bannock Street  
Denver, Colorado 80202

Philip E. Lowery, Esq.  
Philip E. Lowery, P.C.  
Penthouse Suite, The Petroleum Building  
110 Sixteenth Street, Suite 1410  
Denver, Colorado 80202

  
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DISTRICT COURT  
COUNTY OF SAN JUAN  
STATE OF COLORADO

Civil Action  
No. 82 CV 10

MOTION FOR ORDER  
AUTHORIZING SALE

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IN THE MATTER OF THE APPLICATION OF TUSCO INCORPORATED, A NEVADA CORPORATION, FOR AN ORDER AUTHORIZING THE PUBLIC TRUSTEE OF THE COUNTY OF SAN JUAN, STATE OF COLORADO, TO SELL CERTAIN REAL ESTATE UNDER A POWER OF SALE CONTAINED IN A DEED OF TRUST.

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COMES NOW the Applicant, TUSCO INCORPORATED, a Nevada corporation, by and through its attorneys, PHILIP E. LOWERY, P.C., and pursuant to Rule 120 of the Colorado Rules of Civil Procedure, moves this Court for an Order authorizing the Public Trustee of San Juan County, Colorado, to sell certain real property in said San Juan County, Colorado, and in support thereof states as follows:

1. The Applicant, TUSCO INCORPORATED, is the owner and holder of a promissory note executed by and on behalf of TIMBERLINE MINING AND MILLING COMPANY, a Colorado corporation, dated May 8, 1980, in the principal sum of THREE MILLION SIX HUNDRED THOUSAND DOLLARS (\$3,600,000.00) and is beneficiary of a deed of trust executed by and on behalf of TIMBERLINE MINING AND MILLING COMPANY, a Colorado corporation, the same being recorded in Book 220, Page 16, on May 19, 1980, of the records of the County of San Juan, Colorado. A copy of said deed of trust is hereto attached as Exhibit "A";

2. The said deed of trust contains a power of sale to the Public Trustee of the County of San Juan;

3. The Applicant herein is entitled to foreclose the deed of trust and to have the real property herein described sold by the said Public Trustee pursuant to statute due to defaults under the terms of said promissory note on or about July 25, 1981, and January 25, 1982, by the Grantors under said deed of trust, and all persons claiming by, through, or under them in the payment of the principal and interest provided in said Deed of Trust;

4. The real property to be sold is situated in the County of San Juan, State of Colorado, to-wit:

TRACT I:

All of the lands covered and included in that certain patented mining claim, designated by the United States Surveyor General as Lot No. 942, otherwise known, referred to and described as the Howardsville Pacer claim, U. S. Survey No. 942, granted and conveyed by the United States Patent covering said claim issued December 15, 1882, and recorded January 24, 1883, in Book A-1 at Page 246 of the records of the county clerk and recorder of said county and state, to which patent and the record thereof reference is here made for a more particular description of said land.

- EXHIBIT A TO REPLY TO  
RESPONDENT'S ANSWER -

1

TRACT II:

All that part or portion of the "LITTLE NATION" mill-site, Survey No. 169B, described as follows, to-wit:  
Beginning at a point whence Corner No. 2, Survey No. 169B "LITTLE NATION" mill-site, bears N. 63°20' E., 355 feet;  
Thence S. 61°50' W., 85 feet;  
Thence N. 28°10' W., 170 feet;  
Thence N. 61°50' E., 85 feet;  
Thence S. 28°10' E., 170 feet, containing 0.332 acres of surface ground.

TRACT III:

That part or portion of the "LITTLE NATION" mill-site, Survey No. 169B, described as follows, to-wit:  
Beginning at corner No. 2, Survey No. 169B, "LITTLE NATION" mill-site,  
Thence S. 48° W., 250 feet to a point;  
Thence N. 42° W., 217.8 feet to a point;  
Thence N. 48° E., 200 feet to a point;  
Thence S. 42° E., 271.8 feet to a point. Contains 1.0 acres of surface ground, situate in Animas Mining District, San Juan County, Colorado.

TRACT IV:

A portion of the C.B. COBB LOBE MINING CLAIM, U.S. Survey No. 556, Animas Mining District, San Juan County, Colorado, more particularly described as follows:  
Beginning at Corner No. 1 of Survey No. 556, C.B. COBB,  
Thence N. 64° E., 213 feet;  
Thence S. 47°12' E., 119.1 feet;  
Thence S. 41°35' W., 277 feet;  
Thence N. 26°W., 216.7 feet to point of beginning.;

5. The names of (a) the Grantors in said deed of trust; (b) those persons who appear to have acquired a record interest in such real property subsequent to the recording of said deed of trust, and prior to the recording of the Notice of Election and Demand for Sale thereunder; (c) the current record owner of such property; and (d) any person known or believed by the Applicant to be personally liable upon the indebtedness secured by said deed of trust or otherwise interested in this proceeding, as well as the address of each such person as such address is given by recorded instrument evidencing such person's interest (and as to those persons described in (a), (c) and (d) above, their last known addresses as shown by Applicant's records) are shown by Exhibit "B" hereto attached;

6. According to the Applicant's best knowledge and belief, none of the individuals named in Paragraph 5 herein are now or were in the military service of the United States or its allies within the meaning of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended;

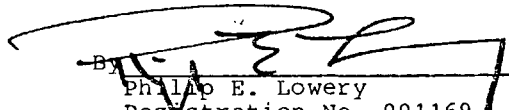


7. Venue is proper pursuant to Rule 120(f) of the Colorado Rules of Civil Procedure and no consumer obligation is involved;

WHEREFORE, the Applicant prays for this Court's Order establishing a time and place for the hearing on this Motion for the Court's Order authorizing the said Public Trustee to sell the described property under the power granted in said deed of trust.

Respectfully submitted,

PHILIP E. LOWERY, P.C.

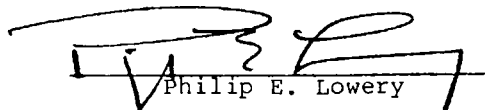
  
By Philip E. Lowery  
Registration No. 001169  
Attorneys for Applicant  
110 - 16th Street #1410  
Denver, Colorado 80202  
(303) 825-8243

Applicant's Address:


4545 East 52nd Avenue  
Commerce City, Colorado 80022

State of Colorado )  
City and County of Denver ) ss.

The undersigned, on behalf of the Applicant, states that the facts set forth herein are true and correct to the best of his knowledge.

  
Philip E. Lowery

Sworn and subscribed to :  
before me this 16<sup>th</sup> day of :  
June, 1982.

  
Notary Public  
1410 Petroleum Building  
Denver, Colorado 80202

My Commission expires: Feb 23, 1986

