"NEW AND IMPROVED" RULE 120 ADOPTED BY COLORADO SUPREME COURT

Fred Skillern

JAMS Dispute Resolution

skillern@jamsdenver.com

All attorneys who do foreclosure work should take note of the recent changes to Rule 120, the procedural rule that guides one through the due process hearing required in conjunction with all public trustee foreclosures. The new rule went into effect on March 1, 2018. Certain changes are substantial, including changes to the notices that must go out to interested persons and changes to the scheduling of hearings. Time to update!

The process began with a request from Chief Justice Nancy Rice to the Supreme Court's Civil Rules Committee, who had heard from members of the legislature about problems expressed by many of their constituents. "The rule is confusing; hearings are not held when scheduled; how can anyone negotiate this maze of jargon and paperwork without a lawyer; why doesn't the rule allow consideration of issues beyond mere default, that courts have said are appropriate for Rule 120?"

I had the privilege of leading the subcommittee formed by the Colorado Supreme Court's Civil Rules Committee to evaluate all aspects of the rule, and especially to address whether the former rule was fair to debtors facing the prospect of a residential foreclosure without the benefit of counsel. The subcommittee included: Chuck Calvin, our CBA Real Estate Section chair for 2017-2018; Deanna Stodden and Liz Marcus, foreclosure specialists with a long history of representing lenders; Keith Gantenbein, who regularly represents debtors in residential foreclosures; Jose Vasquez of Colorado Legal Services; Lee Knapp, a Pueblo trial lawyer and Civil Rules Committee veteran; Debra Knapp of the Denver City Attorney's office, counsel for the Denver Public Trustee and a Civil Rules Committee member; and retired district judges Hon. Mark Hannen and Hon. Norm Haglund.

The subcommittee met over a period of two years, beginning in December 2014, in a series of extensive discussions with spirted and vigorous give, take, and compromise. In the end, the subcommittee made a unanimous vote to submit a new, amended rule. That went to a public hearing before the Supreme Court, was sent back to the subcommittee for further consideration in mid-2016. The subcommittee submitted a revised recommendation, again unanimous, which was approved again by the Civil Rules Committee and finally, in December of 2017, by the Colorado Supreme Court.

The new rule, which can be found online (in plain and redline versions) on the Supreme Court's website at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2017/Rule%20Change%202017(12)(1).pdf.

Committee comments no longer are attached to formal rule publications, but my formal comments to the Supreme Court, in support of the subcommittee's work and in response to questions submitted by

the court following the public hearing, may be found in Krohn, et al., FORECLOSURE LAW IN COLORADO at 126-130 (CLE of Colorado, 2017).

Highlights of the new and improved rule, in no particular order:

1. Plainer language (almost) – in the title and throughout, noting that the rule is focused on powers of sale to public trustees in deeds of trust.
2. The motion for order is to be signed by a person with knowledge "who is competent to testify," i.e., someone other than lender's counsel.
3. The motion includes a copy of the evidence of debt, describes facts giving rise to the claim of default.
4. The motion and subsequent notices shall include those persons whose interest may be terminated by foreclosure.
5. The notice of the motion issued by the court clerk does not set a hearing date, but rather a response deadline. A copy of Rule 120 is included with the notice.
6. A response to the motion is more streamlined. It need not be verified, but must describe facts relied upon in opposing the motion for sale, and may include copies of documents supporting the position. In other words, more like an answer less like a summary judgment response.
7. Only after the court reviews the response and only if the response states grounds for objecting that are within the scope of Rule 120(d) is a hearing set, with best efforts by the clerk to clear dates with parties (who should supply their phone and email contacts, if any).
8. The scope of the hearing may include: a default authorizing exercise of a power of sale; the requirements of the Servicemembers Civil Relief Act; whether the moving party is the real party in interest; and whether the status of any request for a loam modification agreement bars a foreclosure sale as a matter of law.
9. For good cause shown, a district court may continue a hearing.
10. If no response is filed, the response deadline is deemed to be date of hearing for the purposes of complying with our statutes and the SCRA.

For those who may fear that the scope of the hearing is unduly expanded, a look at *Goodwin v. District Court*, 779 P.2d 837 (Colo. 1989) helps to soothe the soul. Be careful out there!

fbs