



If you dispute the default or other facts claimed by Plaintiff to justify this foreclosure, or if you are entitled to protection against the foreclosure under the Servicemembers Civil Relief Act of 2003, as amended, you must make a response to the Verified Motion, stating the facts upon which you rely and attaching copies of any and all documents which support your position. This response must be filed with the Clerk of this Court, at 109 Harmon Park Dr, Pagosa Springs, CO 81147, on or before September 7, 2023 at 8:00 am, and a copy of the response must also be mailed or delivered on or before the same date to Eggleston Kosnik LLC, 160 E. 12 St., Ste 7, Durango, Colorado 81301, Attention: Paul Kosnik.

If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the Court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response.

**IF NO RESPONSE IS FILED BY September 7, 2023 at 8:00 am, THE COURT MAY AUTHORIZE THE FORECLOSURE AND PUBLIC TRUSTEE'S SALE WITHOUT FURTHER NOTICE.**

DATED this 16<sup>th</sup> day of August, 2023.

Eggleston Kosnik, LLC

/s/ Paul Kosnik

Paul Kosnik, #38663  
160 E. 12<sup>th</sup> St., Ste 7  
Durango, CO 81301  
(970) 403-1580  
Attorney for Plaintiff

**THIS COMMUNICATION CONCERNS A DEBT WHICH GARY MORRIS IS ATTEMPTING TO COLLECT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

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**RULE 120. Orders Authorizing Foreclosure Sale Under Power in a  
Deed of Trust to the Public Trustee**

(a) **Motion for Order Authorizing Sale.** When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with knowledge of the contents of the motion who is competent to testify regarding the facts stated in the motion.

(1) **Contents of Motion.** The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder of the county where the property or any portion thereof is located and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust;

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale; and

(v) those persons whose interest in the real property may otherwise be affected by the foreclosure.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the

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address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

**(2) Setting of Response Deadline; Hearing Date.** On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

**(b) Notice of Response Deadline; Service of Notice.** The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response;

(3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of a representative authorized to address loss mitigation requests. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

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(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

**(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.**

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b)

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior to the new hearing date.

**(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order.**

The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

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(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. § 3931, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure 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 other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(f) **Venue.** For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

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(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) **Return of Sale.** The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order is not appealable and shall not have preclusive effect in any other action or proceeding.

(h) **Docket Fee.** A docket fee in the amount specified by law shall be paid by the person filing such motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1) (d), C.R.S.

**History:**

Source: b, e, and f amended February 7, 1991, effective June 1, 1991; a amended February 17, 1993, effective April 1, 1993; a amended and adopted, effective November 16, 1995; c and d amended and effective June 28, 2007; d corrected and effective November 5, 2007; b amended and effective January 7, 2010; b amended and effective October 14, 2010; a, b, and c amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1b, effective 3/1/2018; amended December 7, 2017, effective 3/1/2018.

**Note:**

**Committee Comment**

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

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[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

[3] There was considerable debate concerning whether the Federal "Fair Debt Collection Practices Act" is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal "Fair Debt Collection Practices Act" be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

**Case Note:**

**Annotation**

Law reviews. For article, "War Legislation Affecting Titles to Real Estate", see 21 Dicta 11 (1944). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Foreclosures Through Public Trustee", see 28 Dicta 461 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Additional Real Estate Standards", see 30 Dicta 431 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Inadequacy of Sales Price at Judicially Ordered Sales of Real Property", see 12 Colo. Law, 1435 (1983). For article, "Marshalling in Judicial or Nonjudicial Foreclosure in Colorado", see 13 Colo. Law. 1809 (1984). For article, "Foreclosure by Private Trustee: Now Is the Time for Colorado", see 65 Den. U. L. Rev. 41 (1988). For article, "Rule 120: Relocation of the Meaningful Hearing", see 20 Colo. Law. 495 (1991).

This rule was repealed and readopted to provide for due process safeguards to one who challenges the entitlement to foreclose a deed of trust containing a power of sale to the public trustee. *Valley Dev. at Vail, Inc. v. Warder*, 192 Colo. 316, 557 P.2d 1180 (1976).

Due process requires opportunity to be heard. Due process under section (d) requires only that the respondents to the motion be given an opportunity to

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be heard on their contentions. *Moreland v. Marwich, Ltd.*, 629 P.2d 1095 (Colo. App. 1981), rev'd on other grounds, 665 P.2d 613 (Colo. 1983).

Provisions of this rule must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee. *Dews v. District Court*, 648 P.2d 662 (Colo. 1982).

A completed foreclosure need not be set aside where the complaining party received timely actual notice and was not prejudiced. *Amos v. Aspen Alps 123, LLC*, \_\_\_ P.3d \_\_\_ (Colo. App. 2010).

The provisions of this rule are predicated upon the requirements of the soldiers' and sailors' civil relief act, and the rule was adopted for the purpose of establishing a procedure for compliance therewith. That act by its plain provisions does not prevent the foreclosure of security for any obligation pursuant to a written agreement of the parties executed during the period of military service. *Whitaker v. Hearnberger*, 123 Colo. 545, 233 P.2d 389 (1951).

The purpose of the rule is only to establish the status of the debtor with respect to military service. *Hastings v. Security Thrift & Mtg. Co.*, 145 Colo. 36, 357 P.2d 919 (1960).

Proceedings under this rule are designed to afford holders of notes secured by deeds of trust a means of avoiding questions of marketability of title derived from sales thereunder. Where the debtor was not in military service, the sale by the public trustee could have proceeded without reference to this rule without prejudice to the debtor. *Hastings v. Security Thrift & Mtg. Co.*, 145 Colo. 36, 357 P.2d 919 (1960).

This rule implements the statutory public trustee foreclosure system. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are not adversary proceedings in which the court determines issues and enters a final judgment, and no appeal may be taken to review the same. *Hastings v. Security Thrift & Mtg. Co.*, 145 Colo. 36, 357 P.2d 919 (1960).

When hearing required. If a response to the motion seeking sale under the public trustee's deed is timely filed, the court should conduct a hearing on the existence of the default, and other relevant issues if raised in the response. *Dews v. District Court*, 648 P.2d 662 (Colo. 1982).

The scope of inquiry for a hearing held pursuant to this rule is limited to the existence of a default or other circumstances authorizing the sale, and action collateral to such hearing is necessary to resolve all other issues. *Ragsdale*

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Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987); In re Carpenter, 200 Bankr. 47 (D. Colo. 1996).

The purpose and scope of a hearing pursuant to this rule are very narrow: the trial court must determine whether there is a reasonable probability that a default or other circumstance authorizing exercise of a power of sale has occurred. The test is whether, considering all relevant evidence, there is a reasonable probability that a default exists. United Guar. Residential Ins. Co. v. Vanderlaan, 819 P.2d 1103 (Colo. App. 1991); Plymouth Capital Co. v. District Court, 955 P.2d 1014 (Colo. 1998).

Determination of real party in interest. The trial court in a proceeding under this rule must consider whether the moving parties are the real parties in interest when the issue is properly raised by the debtors. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

The defenses of waiver and estoppel are valid defenses that should be considered by the trial court in a proceeding under this rule if properly raised by the debtor. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

There is no requirement that an order directing foreclosure be filed in the county where the property affected is located. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

The notice procedure requires nothing more than that the notices be mailed to the mortgagee at the address given in the deed of trust. Motlong v. World Sav. & Loan Ass'n, 168 Colo. 540, 452 P.2d 384 (1969).

Certificate of mailing not conclusive. Although section (b) states that "mailing and posting shall be evidenced by the certificate of the clerk", the certificate is not conclusive proof of compliance with the rule but only creates a presumption which may be rebutted with evidence of noncompliance. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

Court may retain supervisory jurisdiction over proposed foreclosure. The narrowly circumscribed scope of a proceeding under this rule does not preclude the court from retaining supervisory jurisdiction over a proposed foreclosure for purposes of ensuring that due process is accorded to the parties. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Ex parte appointment of receiver. While the ex parte appointment of a receiver may be permissible under emergency circumstances or where notice is impractical, a case must be pending at the time of the appointment. Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

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A receivership hearing did not provide petitioners with an effective opportunity to be heard on the issue of foreclosure. *Valley Dev. at Vail, Inc. v. Warder*, 192 Colo. 316, 557 P.2d 1180 (1976).

Injunctive action is not the exclusive action which may be taken under this rule as an aggrieved person may also seek other relief in any court having jurisdiction. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987).

Foreclosure sale must be scheduled within seven days of hearing. When a creditor seeks to foreclose a deed of trust or mortgage, the foreclosure sale must be scheduled not less than seven days after the hearing conducted under this rule. *Kirchner v. Sanchez*, 661 P.2d 1161 (Colo. 1983).

Petitioners may be allowed additional time to redeem. The trial court acts within the limits of its discretion when it allows the petitioners additional time to redeem from the foreclosure sales. *Moreland v. Marwich, Ltd.*, 665 P.2d 613 (Colo. 1983).

Attorney's fees not provided for. The determination of whether attorneys' fees can be recovered and the amount that is due is not within the permissible scope of a proceeding under this rule. *Bakers Park Mining & Milling Co. v. District Court*, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are a "judicial proceeding" and, therefore, "legal action" for the purposes of the federal Fair Debt Collection Practices Act. Thus, former section (f) of this rule, which permitted an action to be filed in any county, was preempted by federal law. But acceptance by district court clerks of improperly filed actions was not "state action" for the purposes of 42 U.S.C. §1983. *Zartman v. Shapiro and Meinhold*, 811 P.2d 409 (Colo. App. 1990) (decided under rule in effect prior to 1989 amendment), *aff'd*, 823 P.2d 120 (Colo. 1992).

The federal Fair Debt Collection Practices Act requires that an action to enforce an interest in real property securing a consumer's obligation, brought by a debt collector, must be brought only in a judicial district in which the real property is located. For purposes of the federal act an attorney who qualifies under the first sentence of the definition in 15 U.S.C. §1692a(6) is a debt collector. *Shapiro and Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (decided under rule in effect prior to 1989 amendment).

Court order under this rule to reform a bid ex post facto was beyond its authority. *United Guar. Res. Ins. v. Vanderlaan*, 819 P.2d 1103 (Colo. App. 1991).

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The statute of limitations applies to each installment due on a note separately and does not begin to run on any one installment until that installment is due. Right to foreclose on note pursuant to this rule is not extinguished because recovery on certain payments is barred by the statute of limitations. Application of Church, 833 P.2d 813 (Colo. App. 1992).

Plaintiffs' due process rights not violated where claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust. Plaintiffs failed to provide to defendant, in writing, a notice of change of address. Defendant thus utilized address specified in the deed of trust to serve its motion and notice under this rule and to provide the public trustee with plaintiffs' most current address. The plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address. Defendant's adherence to the deed of trust' notice provision complied with the notice requirements of section (a). Thus, the notice provision in the deed of trust and defendant's compliance with that provision comported with the requirements of section (a). *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838 (Colo. App. 2005).

Denver district court had jurisdiction to enter order authorizing foreclosure sale in proceeding filed in that court under this rule notwithstanding pending Larimer County proceeding. Under the circumstances of this case, the rule of priority of jurisdiction did not divest the Denver district court of jurisdiction to enter the order authorizing sale. There was no risk of inconsistent decision or duplicative efforts, because defendant had abandoned its efforts to obtain an order authorizing sale from the Larimer county district court and, indeed, had not even filed the necessary documentation to allow it to obtain such an order from the court. Thus, policy reasons supporting rule of priority of jurisdiction are not implicated here. *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838 (Colo. App. 2005).

Applied in *Good Fund, Ltd.-1972 v. Church*, 40 Colo. App. 403, 579 P.2d 1174 (1978); *Boulder Lumber Co. v. Alpine of Nederland, Inc.*, 626 P.2d 724 (Colo. App. 1981); *Krause v. Columbia Sav. & Loan Ass'n*, 631 P.2d 1158 (Colo. App. 1981); *Wiley v. Bank of Fountain Valley*, 632 P.2d 282 (Colo. App. 1981); *Kemp v. Empire Sav., Bldg. & Loan Ass'n*, 660 P.2d 899 (Colo. 1983); *Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n* 661 P.2d 254 (Colo. 1983); *Krause v. Columbia Sav. & Loan Ass'n*, 661 P.2d 265 (Colo. 1983); *Klingensmith v. Serafini*, 663 P.2d 1058 (Colo. App. 1983).