No. 21-

IN THE

Supreme Court of the United States

JAMES P. TATTEN,

Petitioner,

v.

LSF9 MASTER PARTICIPATION TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Obduskey v. McCarthy*, this Court observed: "Colorado's 'nonjudicial' foreclosure process is something of a hybrid, though no party claims these features transform Colorado's nonjudicial scheme into a judicial one." Colorado Rule of Civil Procedure 120(a) (2016), provides, in part: "Whenever an order of court is desired authorizing a sale under a power of sale contained in an instrument, any interested person or someone on such person's behalf may file a verified motion in a district court seeking such order." The Colorado Supreme Court adopted and issued Colo. R. Civ. P. 120 (2016).

The questions presented are:

1. Whether the district court orders that authorized and approved a public trustee sale and transfer of the homeowner's real property, violated the due process and equal protection clauses in the Fourteenth Amendment.

2. Whether the district court's involvement in the state's "nonjudicial" foreclosure scheme, together with the court orders that authorized state officials to sell, title, and seize real property, converted the Colo. R. Civ. P. 120(d) (2016) "nonjudicial" hearing into a trial on the merits, in violation of the homeowner's fundamental rights under the Fourth, Fifth, and Fourteenth Amendments.

PARTIES TO THE PROCEEDINGS

Petitioner, James P. Tatten, was the defendant in the district court and the appellant in the Colorado Court of Appeals.

Tatten is a member of the Bar of this Court. Tatten is cognitively disabled.

Respondent, LSF9 Master Participation Trust, was the plaintiff in the district court and the respondent in the Colorado Court of Appeals.

RELATED CASES STATEMENT

- *James P. Tatten v. LSF9 Master Participation Trust,* No. 2021SC46, Colorado Supreme Court. Judgment entered June 21, 2021.

- *LSF9 Master Participation Trust v. James P. Tatten,* No. 19CA1195, Colorado Court of Appeals. Judgment entered Dec. 24, 2020.

- *LSF9 Master Participation Trust v. James P. Tatten and Any and All Other Occupants Claiming an Interest,* No. 2018CV336, District Court, Denver County, Colorado. Judgment entered June 21, 2019.

- *In the Matter of Application of LSF9 Master Participation Trust for an Order Authorizing the Public Trustee of DENVER County Colorado, to Sell Certain Property Under a Power of Sale Contained in a Deed of Trust,* No. 2016CV30555, District Court, Denver County, Colorado. Judgment entered Apr. 26, 2016.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, James P. Tatten, respectfully submits this petition for a writ of certiorari to review the judgment of the Colorado Supreme Court.

REPORTS OF THE OPINIONS AND ORDERS

The decisions in this case in the lower courts are styled *LSF9 Master Participation Trust v. James P. Tatten.* The order of the Colorado Supreme Court is unpublished and is attached hereto as Appendix A (Pet. App. 1a). The opinion of the Colorado Court of Appeals is unpublished and is attached hereto as Appendix B (Pet. App. 2a-11a). The opinion of the District Court, Denver County, Colorado, is unpublished and is attached hereto as Appendix C (Pet. App. 12a-22a).

STATEMENT OF JURISDICTION

The Colorado Supreme Court issued its order denying discretionary review on June 21, 2021. On July 19, 2021, this Court ordered that, in any case in which the relevant lower court order denying discretionary review was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended 150 days from the date of the judgment or order. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States of America.

The Fourth Amendment provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated…." U.S. Const. amend. IV.

The Fifth Amendment provides, in pertinent part: "…nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws." U.S. Const. amend. XIV, §1.

The statutory provision involved is Colorado Rule of Civil Procedure 120 (2016). Colo. R. Civ. P. 120 (2016) provides, in pertinent part:

(a) Motion; Contents. "Whenever an order of court is desired authorizing a sale under a power of sale contained in an instrument, any interested person…may file a verified motion in a district court seeking such order." Colo. R. Civ. P. 120(a) (2016).

(c) Response; Contents; Filing and Service. "Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing sale may file

and serve a response to the motion…." Colo. R. Civ. P. 120(c) (2016).

(d) Hearing; Scope of Issues; Order; Effect. "…the court shall examine the motion and the responses…the scope of inquiry…shall not extend beyond the existence of default or other circumstances authorizing, under the terms of the instrument described in the motion… the court shall determine whether there is a reasonable probability that such default or other circumstance has occurred…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…." Colo. R. Civ. P. 120(d) (2016).

The complete text of Colorado Rule of Civil Procedure 120 (2016) is attached hereto as Appendix D (Pet. App. 23a-28a).

INTRODUCTION

This case is ripe for review because it presents important and timely federal questions that are exceptionally important to homeowners, creditors, and state and federal courts concerning foreclosure and eviction.

In this case, the Colorado Supreme Court should have recognized that its rule, Colo. R. Civ. P. 120(d) (2016), which authorized and approved the sale, transfer, and seizure of Tatten's home and real property, by state officials, violated Tatten's rights under the Fourth, Fifth, and Fourteenth Amendments.

In this case, the Colorado Supreme Court should have recognized that the measure of the district court's involvement in the limited scope hearing, conducted pursuant to Colo. R. Civ. P. 120(d) (2016), converted a "nonjudicial" hearing into a trial on the merits, in violation of Tatten's rights to due process and equal protection under the Fourteenth Amendment.

The Colorado Supreme Court's erroneous decision to deny review and decline the exercise of its power of supervision over its own "nonjudicial" foreclosure rule and the resulting eviction, poses a timely and ongoing threat to the important decisions issued by this Court concerning fundamental rights and protections under the Fourteenth Amendment.

The proceedings and this petition are products of a Colorado Supreme Court "nonjudicial" foreclosure rule, Colo. R. Civ. P. 120(d) (2016).

On February 18, 2016, the Respondent filed a motion for a court order to authorize a public trustee sale of Tatten's home and real property, pursuant to Colo. R. Civ. P. 120 (2016). Because Tatten filed a response, the district court conducted a "nonjudicial" foreclosure hearing, pursuant to Colo. R. Civ. P. 120(d) (2016).

The transcript for the Colo. R. Civ. P. 120(d) (2016) hearing verifies that the Respondent did not appear. The transcript verifies that the Respondent did not present a witness representative to the court. The transcript verifies that the Respondent did not offer admissible evidence or witness testimony to prove standing or real party in interest. The transcript verifies that the Respondent did

not offer admissible evidence or witness testimony to prove the truth of the allegations contained in the motion.

Despite the facts that the Respondent failed to appear; failed to offer any admissible evidence; failed to offer a witness representative to testify to prove the requirements for standing and real party in interest; and failed to offer evidence or witness testimony to prove the truth of the allegations contained in the motion, the district court granted the Respondent's motion.

Under Colo. R. Civ. P. 120(d) (2016), the district court order that authorized the public trustee to conduct a sale of Tatten's home and real property is not an appealable order or judgment.

Confusingly, Colo. R. Civ. P. 120(d) (2016), provides in part: "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…."

Colorado's "nonjudicial" foreclosure scheme, together with the district court orders that authorized and approved the public trustee sale of Tatten's home and real property, undeniably and indisputably prejudiced and violated Tatten's rights to seek relief in the state and federal courts.

In November 2016, Tatten appeared before the Colorado Supreme Court and offered comments on proposed changes to Colo. R. Civ. P. 120 (2016). Tatten opened by stating: "For far, far too long, Colorado's Judiciary has authorized state actors to use 'non-judicial'

foreclosure to deprive Coloradans of the rights, privileges, and immunities secured by the Constitution and laws of the United States of America." Tatten went on to state: "Now is the time for the Colorado Supreme Court to honor the oath and advance the mission by crafting a foreclosure rule that complies with the Constitution and laws of the United States of America."

On March 1, 2018, the Colorado Supreme Court adopted and issued a new Colo. R. Civ. P. 120. In the new rule, the Colorado Supreme Court slightly extended the scope of the limited "nonjudicial" hearing by permitting a district court to consider "whether the moving party is the real party in interest." Colo. R. Civ. P. 120(d)(1)(C) (2018).

This Court, in *Cooper v. Aaron*, 358 U.S. 1, 3 (1958), held: "…constitutional rights…can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes…whether attempted 'ingeniously or ingenuously'".

This case is a perfect vehicle for this Court to address the proper measure for state and federal court involvement in state judicial and "nonjudicial" foreclosure and eviction schemes under the Fourteenth Amendment.

STATEMENT OF THE CASE

A. Factual Background

On February 10, 2016, the Respondent filed a notice of election and demand for sale with the Denver public trustee.

On February 18, 2016, the Respondent filed a verified motion for a court order authorizing sale of real property in the District Court, City and County of Denver, Colorado. The Respondent's action is captioned, *In the Matter of the Application of LSF9 Master Participation Trust...,* District Court, Denver County, Colorado, Case No. 2016CV30555.

On March 10, 2016, Tatten filed a verified response to Respondent's motion for a court order authorizing a sale by a public trustee.

On April 1, 2016, Respondent filed a motion for absentee testimony, pursuant to Colo. R. Civ. P. 43(i)(1). The Respondent's motion stated, in part: "…because the testimony of the witness relates to certain business records supporting Applicant's assertion that the loan is in default." The motion also stated: "Applicant's witness representative will testify as to the issue of default." The Respondent's motion further stated: "The witness representative will testify as to certain business records to support its assertion that the subject loan is in default." The motion continued: "Respondent will have an opportunity to cross-examine Applicant's witness representative during the hearing, which is to be tried to the Court and not a jury." The motion for absentee testimony also stated: "Testimony by telephone has been held to provide a fair hearing required by due process." *Bodensieck v. Indus. Claim Appeals Office,* 183 P.3d 684, 686 (Colo. App. 2008)."

On April 6, 2016, Tatten filed a response in opposition to the Respondent's motion for absentee testimony and argued, in part: "The relevant facts…require a proper

application of the fundamental principles of evidence, due process, and equal protection. Tatten argued: "The Applicant is asking this Court to confess the credibility of an unknown and unidentified witness representative." Tatten also argued: "Granting the Applicant's motion to allow telephone testimony…will erroneously and unduly prejudice the presentation of an affirmative defense by…a cognitively disabled, *pro se* litigant." The district court granted the Respondent's motion for absentee testimony. [*In the Matter of the Application of LSF9 Master Participation Trust for an Order…,* District Court, Denver County, Colorado, Case No. 2016CV30555, Response in Opposition to Motion.]

On April 22 and April 25, 2016, the district court conducted a "nonjudicial" hearing under Colo. R. Civ. P. 120(d) (2016). The transcript verifies that the Respondent did not appear. The transcript verifies that the Respondent did not present a witness representative to the court. The transcript verifies that the Respondent did not offer admissible evidence or witness testimony to prove standing or real party in interest. The transcript verifies that the Respondent did not offer admissible evidence or witness testimony to prove the truth of the allegations contained in the motion that was before the district court. [*In the Matter of the Application of LSF9 Master Participation Trust for an Order…,* District Court, Denver County, Colorado, Case No. 2016CV30555, Courtroom 209, Certified Transcript.]

The attorney responsible for executing and signing the verification contained in the Respondent's motion for order, did not appear and did not provide testimony to the district court during the April 22 and April 25, 2016, Colo. R. Civ. P. 120(d) (2016) hearing.

Despite the facts that the Respondent failed to appear and failed to present a witness representative to prove the requirements for standing and real party in interest, the district court granted the Respondent's motion for a court order.

Despite the facts that the Respondent failed to appear and failed to present a witness representative to offer evidence and testimony to prove the truth of the allegations contained in the verified motion, the district court granted the Respondent's motion for a court order.

The district court issued its order on April 26, 2016. The order states, in part: "THE COURT FINDS that there is a reasonable probability that the default or other circumstance alleged in the Motion for Order to justify the invocation of the power of sale has occurred…." The court order also states: "…the provisions of Rule 120 of the Colorado Rules of Civil Procedure have been complied with and that the motion should be granted." [*In the Matter of the Application of LSF9 Master Participation Trust for an Order…*, District Court, Denver County, Colorado, Case No. 2016CV30555, Court Order.]

A review of the records and hearing transcript shows that the Respondent failed to prove a factual and legal basis for the district court to grant the motion for a court order to authorize the public trustee to conduct a sale of Tatten's home and real property.

On June 8, 2016, Tatten filed an emergency motion to enjoin or vacate the court order authorizing a public trustee sale of his home and real property. Tatten's emergency motion states: "…is seeking to enforce an

Order Authorizing Sale issued by this Court on April 26, 2016, violates the Constitution of the United States of America and due process." Tatten's motion states: "Any sale at auction by the Office of the Public Trustee will be in violation of the Constitution of the United States of America, due process…" The district court denied Tatten's emergency motion on June 8, 2016. [*In the Matter of the Application of LSF9 Master Participation Trust for an Order…,* District Court, Denver County, Colorado, Case No. 2016CV30555, Emergency Motion.]

B. Proceedings Before the Denver District Court

1. Colo. R. Civ. P. 120 (2016)

On April 22 and April 25, 2016, the district court conducted a "nonjudicial" foreclosure hearing pursuant to Colo. R. Civ. P. 120 (2016). *In the Matter of the Application of LSF9 Master Participation Trust...*, District Court, Denver County, Colorado, Case No. 2016CV30555.

After the Colo. R. Civ. P. 120(d) (2016) "nonjudicial" hearing, the district court granted Respondent's motion for a court order authorizing a sale of Tatten's home and real property by the public trustee. The district court issued its order authorizing a sale on April 26, 2016.

On June 9, 2016, pursuant to the district court order, the public trustee conducted a sale of Tatten's home and real property.

On June 14, 2016, the district court issued its order that approved the public trustee's sale of Tatten's home and real property.

On June 16, 2016, the public trustee issued a certificate of purchase of Tatten's home and real property to the Respondent.

On July 5, 2016, the public trustee executed, issued, and recorded a Public Trustee's Confirmation Deed for Tatten's home and real property to Respondent. [Denver Public Trustee Foreclosure Sale, #2016-000063.]

2. Forcible Entry and Unlawful Detainer

On June 19, 2018, Respondent filed a verified complaint in forcible entry and unlawful detainer. The action is captioned, *LSF9 Master Participation Trust v. James P. Tatten...,* District Court, Denver County, Colorado, Case No. 2018CV336.

On June 18, 2019, Tatten filed the affidavit of a national expert in the areas of foreclosure, chain of title, securitization of loans, and forensic accounting. Tatten hired the expert to review and audit Tatten's promissory note and deed of trust. Tatten's expert found, in pertinent part: "…it is my opinion that the Plaintiff in this matter ('LSF9 Master Participation Trust') failed to…provide any proof of its actual legal existence. The named Plaintiff is a misrepresentation and 'sham' entity that holds not assets, including the Tatten DOT or original Note. As such, a fraud is being perpetrated upon this Court." [*LSF9 Master Participation Trust v. James P. Tatten…,* District Court, Denver County, Colorado, Case No. 2018CV336, Affidavit and Testimony of Private Investigator, p. 25.]

On June 21, 2019, the district court granted the Respondent's motion for summary judgment.

The district court's order, provides in part: "Defendant objects, stating that genuine issues of material fact remain…whether the Plaintiff brought a time-barred, non-judicial foreclosure action under Colorado Rule 120 based a false and fraudulent Affidavit that was filed with the Court…and whether the Court has violated Defendant's fundamental rights under the state and federal Constitutions." [*LSF9 Master Participation Trust v. James P. Tatten,* District Court, Case No. 2018CV336, Order RE: Plaintiff's Motion, p. 2]

The district court's order explains, in part: "Under Colorado law, a forceable entry and detainer claim is established when: (1) a person in possession of property defined with reasonable certainty (2) is in possession of property after a Rule 120 order authorized sale, (3) which sale was held, (4) and new owner filed a proper action for possession of the property…." [*Id.* at p. 3]

The district court order states: On June 14, 2016, the District Court approved the Sale. Denver District Court Case No. 16CV30555, June 14, 2016, Order." [*Id*. at p. 4]

3. Writ of Restitution

On July 17, 2019, the district court entered an amended writ of restitution in Case No. 2018CV336.

C. Proceedings Before the Colorado Court of Appeals

On June 26, 2019, Tatten filed a notice of appeal and designation of record in District Court, Denver County, Colorado, Case No. 2018CV336. The Colorado Court of

Appeals issued its opinion in Case No. 2019CA1195 on December 24, 2020.

The Colorado court of appeals opinion contains three statements that are important to the questions presented in this petition.

First, the court of appeals opinion states: "He also contends that the district court violated his Fourteenth Amendment rights, apparently by authorizing and then confirming the sale of the property." [COA, Opinion, ¶ 7]

Second, the opinion states: "…Tatten asserted that 'Colorado's non-judicial foreclosure process violated the due process and equal protection provisions of Section 1 of the Constitution of the United States of America." [*Id.* at ¶ 20]

Finally, the opinion states: "…in reasserting his contention that the orders authorizing the sale and approving the sale are void, he points to various alleged procedural deficiencies in the Rule 120 hearing, including challenging whether LSF9 was a real party in interest and the manner in which the court conducted the hearing." [*Id.* at ¶ 22]

D. Proceedings Before the Colorado Supreme Court

On April 1, 2021, Tatten filed petition for a writ of certiorari to the Colorado Court of Appeals. One of Tatten's questions presented asked: "Whether the applicant's verified C.R.C.P. 120 (2016) motion for order authorizing sale satisfied the requirement of standing and real party in interest." Another asked: "Whether

the C.R.C.P. 120 (2016) hearing violated the borrower's rights under U.S. Const. amend. XIV, §1." [*LSF9 Master Participation Trust v. James P. Tatten,* Supreme Court, State of Colorado, Case No. 2021SC46, Petition for Writ of Certiorari, p. 7.]

On April 30, 2021, Tatten filed a reply to the Respondent's opposition to the petition for writ of certiorari.

In his reply, Tatten argued, in part: "Because the Denver district court lacked jurisdiction and the Denver public trustee was not charged with the exercise of powers properly belonging to the judicial department, the public trustee's confirmation deed…is void *ab initio.*" [*LSF9 Master Participation Trust v. James P. Tatten,* Supreme Court, State of Colorado, Case No. 2021SC45, Tatten Reply, p. 7.]

In his reply, Tatten argued about an implicit bias in Colo. R. Civ. P. 120 (2016). Tatten argued: "…the facts, records, and totality of circumstances show…that the Denver district court…erred by ignoring Tatten's right to due process and right to equal protection of the laws, under the Fourteenth Amendment…." [*Id.* at 23.]

REASONS FOR GRANTING THE PETITION

I. The Questions Presented are Timely and Exceptionally Important to Homeowners, Creditors, and State and Federal Courts.

A. The COVID-19 Pandemic has Heightened Nationwide Confusion and Uncertainty Concerning the Rights of Homeowners and Creditors Involved in Foreclosure or Eviction Proceedings.

Soon after learning of COVID-19, state and federal leaders expressed an immediate and nationwide concern for American housing. That national concern resulted in local, state, and federal programs to provide emergency rental and foreclosure relief to millions of tenants, homeowners, and landowners experiencing hardship from the COVID-19 pandemic. At some time, COVID-19 housing relief will end and the state and federal courts may be inundated and overwhelmed with foreclosure and eviction related proceedings. For those reasons, guidance from this Court may help prevent irreversible constitutional harm to tenants, homeowners, property owners, and communities, throughout this country.

B. The COVID-19 Pandemic has Heightened Nationwide Confusion and Uncertainty Concerning State and Federal Court Involvement in Foreclosure and Eviction Proceedings.

As the American economic system adjusts and adapts to the COVID-19 pandemic, uncertainty and confusion

continues to grow in the legal and legislative communities over local, state, and federal foreclosure and eviction restrictions and moratoriums. Absent guidance from this Court, the nationwide uncertainty and confusion will grow and spread through the anticipated wave of foreclosure actions, foreclosure judgments, court orders of sale, and foreclosure-related evictions, in both the state and federal courts.

II. The State Court of Last Resort's En Banc Decision to Deny Review of the Court's "Nonjudicial" Foreclosure Rule Openly Disregards Fundamental Rights under the Fourteenth Amendment.

This case should cause pause and renew a commitment to the right to due process under the Fourteenth Amendment.

In *Cooper v. Aaron*, 358 U.S. 1, 3 (1958), this Court stated: "…constitutional rights…can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes…whether attempted 'ingeniously or ingenuously'".

"The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). "In procedural due process claims…what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.* "Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Id.* "This inquiry would

examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Id.*

In this case, the Colo. R. Civ. P. 120(d) (2016) transcript shows: Respondent did not appear; Respondent did not present a witness representative; Respondent did not prove standing or real party in interest; and Respondent did not offer admissible evidence or testimony to prove the truth of any allegation contained in its motion that was before the district court.

The Colo. R. Civ. P. 120(d) (2016) transcript shows that the district court, driven by questioning from the Respondent's foreclosure attorney, shifted the burden of proof to the *pro se* and cognitively disabled Tatten. As a result of that shift, the *pro se* and cognitively disabled Tatten was charged with disproving allegations made in the Respondent's motion. Because of that shift, the "nonjudicial" proceeding became a trial, before a judge, on the merits of Tatten's verified response and affirmative defenses, which the court rejected.

The attorney responsible for executing and signing the verification contained in the Respondent's motion for order, did not appear and did not provide testimony to the district court during the April 22 and April 25, 2016, Colo. R. Civ. P. 120(d) (2016) hearing.

Colo. R. Civ. P. 120(d) (2016), states: "The scope the inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing… exercise of power of sale…and such other issues required by…50 U.S.C. §520."

A review of the records and transcript shows that the Respondent failed to prove a factual basis for the district court to grant the motion and issue a court order to authorize the public trustee to conduct a sale of Tatten's home and real property.

The Fourteenth Amendment cannot, and does not, allow a state court to authorize a state official to sell, transfer, or seize a home or real property for the benefit of an unknown person or unknown entity, who failed to appear and failed to offer evidence or testimony to the court to prove standing and real party interest. A verified motion for a court order to authorize a state official to sell a home and the real property cannot, and does not, satisfy the requirements for due process under the Fourteenth Amendment.

"A fair trial in a fair tribunal is a basic requirement of due process…our system of law has always endeavored to prevent even the probability of unfairness …every procedure which would offer a possible temptation… not to hold the balance nice, clear, and true…denies… due process of law." *In re Murchison,* 349 U.S. 133, 136 (1955). "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'". *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

The protections in the Fourteenth Amendment apply to any type of proceeding, held in a courtroom, before a judge, which could immediately infringe on the life, liberty, or property interests of a pro se and cognitively disabled party.

In 2018, the Colorado Supreme Court amended its rule and expanded the scope of the limited Colo. R. Civ. P. 120(d) "nonjudicial" hearing by permitting the district court to consider "whether the moving party is the real party in interest." Colo. R. Civ. P. 120(d)(1)(C) (2018).

This Court, in *Obduskey v. McCarthy Holthus LLP*, 586 U.S. ___ (2019), stated, in pertinent part: "In court, the homeowner may contest the creditor's right sell the property, and a hearing will be held to determine whether the sale should go forward. Colo. Rules Civ. Proc. 120(c), (d)."

Under Colo. R. Civ. P. 120(d) (2016), there are only two questions for the court: whether there was a reasonably probability of a default and whether an order authorizing sale is otherwise proper under the Service Member Civil Relief Act. Those two questions limit the evidence and defenses available to a homeowner to challenge the allegations contained in a motion filed in the court.

Moreover, the district court prohibited Tatten from contesting the factual and legal allegations contained in the Respondent's motion because, according the court, Tatten's objections were beyond the scope of Colo. R. Civ. P. 120(d) (2016).

Once the district court issued its order of sale, Tatten could find no state or federal court willing to review or challenge the district court orders and the Colo. R. Civ. P. 120(d) (2016) proceedings.

In *Obergefell v. Hodges,* 576 U.S. 644, 663 (2015), this Court stated: "The identification and protection of

fundamental rights is an enduring part of the judicial duty to interpret the Constitution…it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect." This Court also stated in *Obergefell*: "When new insights reveal discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Id.* at 664.

"For a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). "Standing is a threshold issue that must be satisfied for a court to decide a case on the merits." *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). A court does not have jurisdiction over a case unless a plaintiff has standing to bring it. *Hotaling v. Hickenlooper,* 275 P.3d 723, 725 (Colo. App. 2011). "To satisfy that test, the plaintiff must establish that (1) he or she suffered an injury in fact and (2) the injury was to a legally protected interest." *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002 (Colo. 2014).

"Colo. R. Civ. P. 17(a) requires that every action shall be prosecuted in the name of the real party in interest." *Goodwin v. Dist. Ct.*, 779 P.2d 837, 843 (Colo. 1989). "The real party in interest is that party who, by virtue of substantive law, has the right to invoke the aid of the court in order to vindicate the legal issue in question." *Id.*

The district court orders that authorized and approved the sale, transfer, and seizure of Tatten's home and real property under Colo. R. Civ. P. 120(d) (2016), are void *ab initio*.

For that reason, the writ of restitution in District Court, Denver County, Colorado, Case No. 2018CV336, as its legal progeny, is also void *ab initio*.

The Colorado Supreme Court's decision to deny review and decline the exercise of its power of supervision over its own "nonjudicial" foreclosure rule and the resulting eviction, openly and directly nullified his rights under the Fourth, Fifth, and Fourteenth Amendments, in clear violation of this Court's decision in *Cooper v. Aaron*.

III. This Case is the Perfect Vehicle to Review a Decision from a State Court of Last Resort Concerning the Measure of State Court Involvement in a "Nonjudicial" Foreclosure Scheme under the Due Process and Equal Protection Clauses in the Fourteenth Amendment.

This case is a perfect vehicle to measure state court involvement in a state "nonjudicial" foreclosure scheme.

This case begins with the Respondent filing a verified motion under Colorado Supreme Court's "nonjudicial" foreclosure rule, Colo. R. Civ. P. 120 (2016).

From there, this case moves on a clean path through the state's lower courts, where the lower courts issue court orders that authorize or approve the sale, transfer, and seizure of real property by state officials.

Finally, this case is a perfect vehicle because it ends at the Colorado Supreme Court, where the state court of last resort issued a decision that denied review and declined the exercise of the power of supervision over the

court's own "nonjudicial" foreclosure rule, Colo. R. Civ. P. 120(d) (2016).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: November 18, 2021

APPENDIX

APPENDIX A — ORDER OF THE COLORADO SUPREME COURT, FILED JUNE 21, 2021

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Supreme Court Case No: 2021SC46

JAMES P. TATTEN,

Petitioner,

v.

LSF9 MASTER PARTICIPATION TRUST,

Respondent.

Certiorari to the Court of Appeals, 2019CA1195
District Court, City and County of Denver, 2018CV336

ORDER

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, *EN BANC*, JUNE 21, 2021.

APPENDIX B — OPINION OF THE COLORADO COURT OF APPEALS, FILED DECEMBER 24, 2020

COLORADO COURT OF APPEALS

LSF9 MASTER PARTICIPATION TRUST,

Plaintiff-Appellee,

v.

JAMES P. TATTEN,

Defendant-Appellant.

ORDERS AFFIRMED

DATE FILED:
December 24, 2020

Court of Appeals No. 19CA1195

City and County of Denver
District Court No. 18CV336

Honorable Kandace C. Gerdes, Judge

Division A
Opinion by JUDGE TOW
Bernard, C.J., and J. Jones, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 24, 2020

Appendix B

This appeal arises from a forcible entry and detainer action filed by plaintiff, LSF9 Master Participation Trust (LSF9), against defendant, James P. Tatten. Tatten appeals the district court's order granting summary judgment in favor of LSF9, and the court's orders dismissing Tatten's counterclaims and denying his motion to stay the eviction proceedings. We affirm.

I. Background

In November 2008, Tatten suffered a traumatic brain injury and stopped making payments on his home mortgage loan. In 2009, the bank that held the mortgage on the home at the time began foreclosure proceedings but withdrew the proceedings when Tatten signed a loan modification agreement. Tatten again failed to make any payments, and the bank again sought to foreclose on the property. However, Tatten filed a separate action, seeking damages and injunctive relief based on various tort, contract, and statutory claims. The bank removed that action to federal district court, which ultimately dismissed Tatten's complaint. *Tatten v. Bank of Am. Corp.*, No. 12-CV-00459-KMT, 2013 WL 4494305 (D. Colo. Aug. 21, 2013) (unpublished order). The dismissal was affirmed on appeal. *Tatten v. Bank of Am. Corp.*, 562 F. App'x 718 (10th Cir. 2014). Nevertheless, it appears the bank abandoned the efforts to foreclose on the mortgage at that time. The bank later sold Tatten's home loan account to LSF9.

In 2016, LSF9 initiated foreclosure proceedings by filing a notice of election and demand for sale with the Denver County Public Trustee and a motion for an order

authorizing the sale pursuant to C.R.C.P. 120 with the Denver District Court in case number 16CV30555. In April 2016, the Denver District Court held contested Rule 120 hearings and issued an Order Authorizing Sale (OAS). LSF9 purchased the property from the Public Trustee at the sale in June 2016. The public trustee issued a certificate of purchase and confirmation deed to LSF9 and the district court approved the sale.

Two weeks after the sale, Tatten filed suit in federal court against LSF9, the City and County of Denver, and the Public Trustee, challenging the OAS on numerous grounds. The United States District Court dismissed the complaint. *Tatten v. City & Cnty. of Denver*, No. 16-CV-01603-RBJ-NYW, 2017 WL 1435854 (D. Colo. Mar. 29, 2017) (unpublished order). The dismissal was affirmed by the Tenth Circuit Court of Appeals. *Tatten v. City & Cnty. of Denver*, 730 F. App'x 620 (10th Cir. 2018).

In 2018, at the conclusion of Tatten's federal challenge, LSF9 filed the underlying forcible entry and detainer action in Denver County Court to proceed with foreclosure on the house. Tatten filed several counterclaims and the case was transferred to Denver District Court. LSF9 filed a motion to dismiss Tatten's counterclaims, which the district court granted. In 2019, LSF9 filed a motion for summary judgment. Tatten failed to respond to this motion by the district court's deadline. He then filed a document entitled "Motion to Stop Proceedings and for Order to Vacate and Correct Order Re: Motion for Summary Judgment" (Motion to Stay Proceedings) in which he requested more time to respond to the motion for summary judgment.

This motion was denied. The district court then granted LSF9's motion for summary judgment.

Tatten now appeals.

II. Discussion

Tatten asserts that the district court erred by (1) dismissing his counterclaims; (2) granting LSF9's motion for summary judgment; and (3) denying his motion to stay proceedings. He also contends that the district court violated his Fourteenth Amendment rights, apparently by authorizing and then confirming the sale of the property. We address, and reject, each of the first three contentions in turn and decline to consider the fourth.

A. Tatten's Counterclaims

Tatten argues that the district court erred by dismissing his counterclaims. We disagree.

We review the district court's ruling on a motion to dismiss de novo. *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005).

We note that although Tatten is pro se, he must adhere to the same procedural rules applicable to attorneys. *Manka v. Martin*, 200 Colo. 260, 267, 614 P.2d 875, 880 (1980). C.A.R. 28(a)(7)(B) states that an appellate brief must set forth "appellant's contentions and reasoning, with citations to the authorities and parts of the record on which the appellant relies." We will not consider a

bald legal proposition presented without argument or development. *People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003). Tatten is required to "inform the court both as to the specific errors asserted and the grounds, supporting facts, and authorities to support their contentions." *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010). This is true even where the party is pro se. *Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3 (noting, in a case in which the plaintiff was pro se, that "[w]e do not consider bald factual or legal assertions presented without argument or development" (citing *S.R. Condos., LLC v. K.C. Constr., Inc.*, 176 P.3d 866, 869 (Colo. App. 2007))). While we "must interpret pro se pleadings and motions liberally, liberal construction does not include inventing arguments not made by the pro se party." *Minshall v. Johnston*, 2018 COA 44, ¶ 21.

Tatten brought eight counterclaims against LSF9. In its thorough and well-reasoned order dismissing the counterclaims, the district court carefully addressed the elements of each claim and noted how Tatten's allegations failed to plead facts that would establish one or more elements of each of the claims.

On appeal, Tatten does not assert any specific errors committed by the district court pertaining to each counterclaim. Instead, he makes broad assertions challenging the validity of the Rule 120 hearing and the OAS. He does not explain how the district court's specific conclusions in dismissing his counterclaims were erroneous. Nor does he provide this court with any authority dictating reversal of the district court's decision

to dismiss his counterclaims. Absent any specific assertion of error or showing of any specific grounds, facts, or authorities warranting reversal, we decline to disturb the district court's order.

B. Summary Judgment

Tatten contends that the court erred by granting LSF9's motion for summary judgment because the OAS, which the motion and the order relied on, was void. Again, we disagree.

Appellate courts review a trial court's order granting or denying a motion for summary judgment de novo. *Vail/Arrowhead, Inc. v. Dist. Ct.*, 954 P.2d 608, 611 (Colo. 1998). "Summary judgment is appropriate only if the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Collard v. Vista Paving Corp.*, 2012 COA 208, ¶ 16. The moving party "bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Once the moving party has met that burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* "[A] genuine issue of material fact cannot be raised simply by allegations of pleadings or argument of counsel. Rather, in response to a motion for summary judgment, an adverse party must by affidavit or otherwise set forth specific facts showing

there is a genuine issue for trial." *Brown v. Teitelbaum*, 830 P.2d 1081, 1084-85 (Colo. App. 1991). Failure to meet that burden will result in summary judgment in favor of the moving party. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo. App. 1996).

In its order, the district court ruled that

> Defendant does not allude to any evidence contradicting that put forth by Plaintiff. Defendant does not submit any of his own affidavits or exhibits or offer support for his allegations. The Court finds that Defendant has not met his burden of establishing that there are genuine issues of fact left to be decided.

Tatten argues, however, that the OAS was void and thus the sale was invalid. Therefore, he contends, there was a genuine issue of material fact that precluded the granting of summary judgment. But, as the district court noted, Tatten presented no facts by affidavit or otherwise that could call the validity of the sale into question. Therefore, the district court properly considered the sale to be valid and appropriately found that Tatten failed to establish that there was a triable issue of fact. Accordingly, we conclude the district court did not err by granting the motion for summary judgment.

C. Motion to Stay Proceedings

Tatten next argues that the district court erred by denying his request to stay the proceedings. We discern no basis for reversal.

The only argument Tatten provides regarding this issue is the following bare and conclusory statement: "Appellant Tatten hereby incorporates by reference each and every statement, argument, paragraph, document, and discussion contained or described above. The Denver District Court erred." However, we have already determined that Tatten's challenges to the grant of summary judgment and the dismissal of his counterclaims lack merit. And we conclude they are equally unavailing in support of his challenge to the order denying his request to stay the proceedings. Because there was no impropriety in the court's summary judgment and dismissal orders, there was no basis to obtain a stay of those orders.

D. Fourteenth Amendment

Tatten's final contention is that the district court violated his due process rights under Fourteenth Amendment. Here, he provides the same bare and conclusory statement incorporating the argument related to his primary claim. We decline to address this argument for three reasons: it was not adequately preserved in the trial court, it was not properly developed in the opening brief, and, to the extent it was developed at all, it was first done so in the reply brief.

In opposing the dismissal of his counterclaims in the district court, Tatten asserted that "Colorado's non-judicial foreclosure process violates the due process and equal protection provisions of Section 1 of the Constitution of the United States of America." He did not, however, develop this claim beyond this conclusory statement. *See Maralex*

Res., Inc. v. Colo. Oil & Gas Conservation Comm'n, 2018 COA 40, ¶ 40 (declining to address a constitutional claim that was mentioned in the trial court in only a perfunctory manner).

On appeal, in his opening brief, Tatten simply states that "[t]he Denver District Court's findings and orders in [sic] implicate the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment incorporates and renders applicable to the States Bill of Right protections 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" He provides no explanation as to why a proceeding under Rule 120 runs afoul of the rights implicated by the Fourteenth Amendment. Thus, his challenge is so perfunctory as to be unreviewable.

Only in his reply brief does he expand at all on his constitutional claim. There, in reasserting his contention that the orders authorizing the sale and approving the sale are void, he points to various alleged procedural deficiencies in the Rule 120 hearing, including challenging whether LSF9 was a real party in interest and the manner in which the court conducted the hearing. But even in this context, his only mention of the Fourteenth Amendment was to quote the provision, and to conclude that "Appellant Tatten has suffered injury in fact to his legally protected rights to due process and equal protection caused by errors in a Rule 120 hearing." We generally do not address arguments raised for the first time in a reply brief. *Negron v. Gillespie*, 111 P.3d 556, 559 (Colo. App. 2005) (citing *Flagstaff Enters. Constr. Inc. v. Snow*, 908 P.2d 1183

(Colo. App. 1995)). Here, even if we were inclined to do so, Tatten's statements still do not develop his constitutional challenge sufficiently to enable us to address it.

Because Tatten neither properly preserved nor adequately develops his Fourteenth Amendment challenge, we decline to address it. *Cikraji*, ¶ 21 n.3.

III. Conclusion

The district court's orders are affirmed.

CHIEF JUDGE BERNARD and JUDGE J. JONES concur.

APPENDIX C — OPINION OF THE DISTRICT COURT OF DENVER, FILED JUNE 21, 2019

DISTRICT COURT
CITY & COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

DATE FILED: June 21, 2019 3:46 PM
CASE NUMBER: 2018CV336

Plaintiff:

LSF9 MASTER PARTICIPATION TRUST,

v.

Defendants:

JAMES P. TATTEN and ANY AND ALL OTHER OCCUPANTS CLAIMING AN INTEREST UNDER THE DEFENDANTS.

Case No: 2018CV336
Courtroom: 209

ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff asks the Court to enter summary judgment on its Forcible Entry and Unlawful Detainer action. Defendant submitted a response and Plaintiff replied. After reviewing the parties' filings, the exhibits, applicable

portions of the Court's file, and relevant law, Plaintiff's motion is GRANTED based on the following:

I. BACKGROUND

This action involves Plaintiff's seeking possession of real property located at 8681 East 29th Avenue, Denver, Colorado, 80238, through a forceable entry and detainer action. The original case was brought in Denver County Court 18C60556. While still in Denver County Court, Defendant Tatten ("Defendant") brought counterclaims, the effect of which was to remove the action to Denver District Court. This Court issued an Order on Plaintiff's Motion to Dismiss Counterclaims. *See* October 30, 2018 Order, incorporated herein by this reference.

In summary, Defendant obtained a mortgage loan in 2004 secured by his home located at 8681 East 29th Avenue, Denver, Colorado, 80238 ("property"). After a traumatic brain injury in 2008, Defendant qualified for Social Security disability benefits. Defendant failed to make payments on the mortgage, and in 2009 the bank began foreclosure proceedings. Later in 2009, Defendant signed a loan modification agreement with the bank, but subsequently never made a payment. In 2012, the bank was authorized to sell the property. Defendant sued the bank in federal district court to enjoin the sale, but the case was dismissed and affirmed by the Tenth Circuit Court of Appeals in 2014.

In 2015, Defendant's loan was sold to LSF9, Plaintiff here. Plaintiff initiated a C.R.C.P. 120 hearing in

February 2016 to proceed with foreclosure on the house. Defendant opposed the motion for order authorizing sale and filed suit, again, in the federal district court[1] to enjoin the foreclosure. Both challenges were dismissed. The foreclosure sale was completed on July 5, 2016. Plaintiff brought this action for Forcible Entry and Detainer after the Tenth Circuit affirmed the dismissal of Defendant's latest suit on April 11, 2018.[2]

Plaintiff asks that the Court grant summary judgment on Plaintiff's forceable entry and detainer claim, asserting that it is entitled to summary judgment as there are no issues of material fact and that summary judgment should be granted as a matter of law.

Defendant objects, stating that genuine issues of material fact remain as to the following: whether this Court has subject matter jurisdiction, whether this Court has the judicial authority to grant the motion for summary judgment, whether this Court has the judicial authority to enter judgment on Plaintiff's claim for forcible entry and detainer contained in Notice of Non-Opposition to Motion for Summary Judgment, whether Plaintiff brought a time-barred, non-judicial foreclosure action under Colorado Rule 120, whether Plaintiff brought a time-barred, non-judicial foreclosure action under Colorado Rule 120 based on a false and fraudulent Affidavit that was filed with the Court, Defendant's affirmative defenses to Colorado Rule 120 and subsequent claim for Forcible Entry and Detainer

1. Civil Action No. 16-cv-01603-RBJ-NY

2. Appellate Case No. 17-1141

under the applicable Colorado statute of limitation and the Colorado and United States Constitutions, and whether the Court has violated Defendant's fundamental rights under the state and federal Constitutions.[3]

II. STANDARD OF REVIEW

C.R.C.P. 56(c) allows a court to grant a motion for summary judgment before trial "when the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Gibbons v. Ludlow,* 304 P.3d 239, 244 (Colo. 2013). Because summary judgment "denies litigants their right to [a] trial," it is a "drastic remedy," and is "never warranted except on a clear showing that there is no genuine issue as to any material fact." *Ginter v. Palmer & Co.,* 585 P.2d 583, 584 (Colo. 1978).

A material fact is a fact that, when resolved, "will affect the outcome of the case." *Dominguez Reservoir Corp. v. Feil,* 854 P.2d 791, 795 (Colo. 1993) (internal quotation marks omitted). "Because the trial court may not assess the weight of the evidence or credibility of witnesses in determining a motion for summary judgment, the court may not grant summary judgment when there is a controverted factual issue that must be resolved in a trial." *Kaiser Found. Health Plan of Colo. v. Sharp,* 741

3. Due to the nature of each argument advanced by Defendant as an argument as to law, not as to fact, the Court will not address Defendant's legal allegations.

P.2d 714, 718 (Colo. 1987). Where reasonable people could reach different conclusions about the evidence, summary judgment is not appropriate. *Mt. Emmons Mining Co. v. Town of Crested Butte,* 690 P.2d 231, 239 (Colo. 1984).

The burden to show a dispute about whether there is a genuine issue of material fact is as follows. "The moving party has the initial burden to show that there is no genuine issue of material fact." *AviComm, Inc. v. Colo. Pub. Utils. Comm'n,* 955 P.2d 1023, 1029 (Colo. 1998); *Kaiser Found. Health Plan,* 741 P.2d at 718–19. Because the initial burden is on the moving party, if the moving party does not meet this burden, summary judgment must be denied. *See Wolther v. Schaarschmidt,* 738 P.2d 25, 28 (Colo. App. 1986) ("[If] the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate."); *see also Churchey v. Adolph Coors Co.,* 759 P.2d 1336, 1340 (Colo. 1988). However, if the moving party meets its burden, the burden shifts to the nonmoving party to "adequately demonstrate by relevant and specific facts that a real controversy exists." *City of Aurora v. ACJ P'ship,* 209 P.3d 1076, 1082 (Colo. 2009); *see In re Interest of S.N.*, 329 P.3d 276, 281- 82 (Colo. 2014) ("Only if" the moving party meets its burden "must the opposing party then demonstrate a controverted factual question."). Then, if the nonmoving party "fails to establish a controverted factual question," summary judgment should still only be granted "in a narrow set of circumstances." *Id* at 282. These circumstances include when "the material facts are undisputed [and] also that reasonable minds could draw but one inference from them." *Id.* (internal quotation

marks omitted). Nevertheless, if the nonmoving party meets its burden and shows that a controversy exists, summary judgment must be denied. *See Struble v. Am. Family Ins. Co.,* 172 P.3d 950, 955 (Colo. App. 2007). Any dispute over a material fact must then be resolved at trial. *See Dominguez Reservoir Corp.,* 854 P.2d at 795–96; *see Mt. Emmons Mining Co.,* 690 P.2d at 239 (Summary judgment is reserved "*only* " for cases "where there is no dispute as to material facts and thus no role for the fact finder to play" at a trial.) (emphasis in original).

"[O]n the facts submitted if the question of law is capable of determination the decision should not be withheld because of a claim of other facts, not disclosed, which might result in a different determination." *Norton v. Dartmouth Skis, Inc.*, 364 P.2d 866, 441 (Colo. 1961). Summary judgment is used "in advance of trial to test, not as formerly on bare contentions found in the legal jargon of the pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense." *Sullivan v. Davis*, 474 P.2d 218 (1970). Summary judgment is proper when movant's direct, positive, and uncontradicted evidence is opposed only by an unsupported contention that a contrary inference from the evidence might be possible. *Iowa Nat'l Mut. Ins. Co. v. Boatright*, 516 P.2d 439 (Colo App. 1973). Plaintiff's speculation that further discovery may uncover specific facts showing that there is a genuine issue for trial is insufficient. *WRWC, LLC. V. City of Arvada*, 107 P.3d 1002 (Colo. App. 2004).

Under Colorado law, a forceable entry and detainer claim is established when: (1) a person in possession of property defined with reasonable certainty (2) is in

possession of property after a Rule 120 order authorized sale, (3) which sale was held, (4) and new owner filed a proper action for possession of the property, (5) with said action (including summons and complaint) being properly served upon the party in possession, (6) the court having venue, and (7) making findings as to whether the party in possession is or is not an infant, incompetent person, officer or agency of the State of Colorado, or in the military service. C.R.S. § 13-40-101, *et seq.*

The Court must now determine whether there exists a genuine issue as to any material fact.

III. UNDISPUTED FACTS

For purposes of evaluating Plaintiff's summary judgment motion, the following facts are undisputed. The Court has taken these facts from the pleadings and exhibits contained in the file.[4]

1. Plaintiff is the owner of property commonly known and numbered as 8681 East 29th Avenue, Denver, Colorado 80238 ("property") including any and all outbuildings, and more particularly described as LOT 5, BLOCK 3, STAPLETON FILING NO. 5, CITY AND COUNTY OF DENVER, STATE OF COLORADO. Verified Compl. ¶ 1.

2. Defendant Tatten executed a Deed of Trust dated March 3, 2004, and recorded on March 18, 2004 at

4. The Court finds it proper to take judicial notice. *See* C.R.E. 201.

Reception No. 2004072532 in the records of the Clerk and Recorder, City and County of Denver, State of Colorado. Verified Compl., Ex, A; Amended Verified Answer ¶2.

3. Denver County Public Trustee's Office conducted a non-judicial foreclosure sale on June 9, 2016 and recorded the Certificate of Purchase to Plaintiff as the successful bidder on or about June 16, 2016, at Reception No. 2016080002. Verified Compl. ¶ 4, Ex. B.

4. On June 14, 2016, the District Court approved the sale. Denver District Court Case No. 16CV30555 June 14, 2016 Order.

5. On June 8, 2018, Defendant Tatten was served with a Demand for Possession. Verified Compl. ¶ 7, Ex. E; Amended Verified Answer ¶ 33, 36.

6. On June 22, 2018, Defendant Tatten was served with the Summons and Complaint in this matter, which he Answered. Amended Verified Answer.

7. Defendant Tatten is not engaged in military service of the United States. Verified Compl. ¶ 9; Amended Verified Answer ¶ 2.

8. Defendant Tatten is not an infant, incompetent person, officer or agency of the State of Colorado. [5]

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5. The Court specifically distinguishes Defendant's representation of being "cognitively disabled" with incompetence.

See C.R.C.P. Rule 17(c); *People in Interest of M.M.*, 726 P.2d 1108, 1117 (Colo. 1986) ("A person who labors under some degree of mental impairment is not necessarily legally incompetent to sue or be sued.").

9. As of July 5, 2018 and continuing through the date of this Order, Defendant Tatten is in possession of the property. Amended Verified Answer ¶ 5.

IV. ANALYSIS AND CONCLUSIONS OF LAW

In his Response, Defendant does not allude to any evidence contradicting that put forth by Plaintiff. Defendant does not submit any of his own affidavits or exhibits or offer support for his allegations. The Court finds that Defendant has not met his burden of establishing that there are genuine issues of fact left to be decided.

Further, the Court further finds that:

1. Plaintiff is the owner of the subject property, 8681 East 29th Avenue, Denver, Colorado 80238.

2. Defendant is an individual who has and still resides at 8681 East 29th Avenue, Denver, Colorado 80238, since 2004.

3. An Order authorizing sale was completed.

4. On June 9, 2016, the Plaintiff purchased the property at a public sale. Judge Hoffman issued an order approving sale on June 14, 2016.

5. Plaintiff filed a Verified Complaint in Forcible Entry and Unlawful Detainer on June 19, 2018.

6. The Summons In Forcible Entry and Detainer and Verified Complaint in Forcible Entry and Unlawful Detainer were served on June 22, 2018 and Defendant answered on June 28, 2018. The Court finds that service was proper.

7. The Court finds that venue of this action is proper in this Court.

8. The Court finds that there are no lease or rental agreements between the parties.

9. The Court finds that the Defendant is a person, and is not an infant, incompetent person, officer or agency of the State of Colorado, or in the military service.

10. The Court finds that the Defendant has committed an unlawful detainer of the Premises.

V. ORDER

For the reasons discussed above, Plaintiff's motion for summary judgment is GRANTED.

The Court finds Plaintiff is the owner of and entitled to immediate possession of the real property commonly known as 8681 East 29th Avenue, Denver, CO 80238, and legally described as LOT 5, BLOCK 3, STAPLETON FILING NO. 5, CITY AND COUNTY OF DENVER,

Appendix C

STATE OF COLORADO (the "Property"), by virtue of that certain Public Trustee's Confirmation Deed dated July 5, 2016, and recorded July 5, 2016, in the Denver County Clerk and Recorder's Office, at Reception No. 2016087011.

A Writ may be requested by Plaintiff after the statutory delay of 48 hours has elapsed.

Trial in this matter for July 22, 2019 is hereby VACATED.

SO ORDERED this 21st day of June, 2019.

BY THE COURT:

/s/ Kandace C. Gerdes
Kandace C. Gerdes
District Court Judge

APPENDIX D — COLORADO RULE 120

Rule 120. Orders Authorizing Sales Under Powers

(a) Motion; Contents. Whenever an order of court is desired authorizing a sale under a power of sale contained in an instrument, any interested person or someone on such person's behalf may file a verified motion in a district court seeking such order. The motion shall be accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts claimed by the moving party to justify invocation of the power of sale. 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 by such sale. 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 records of the moving party, of the grantor of such deed of trust, of the current record owner of the property to be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust, as well as the names and addresses of those persons who appear to have acquired a record interest in such real property, subsequent to the recording of such deed of trust and prior to the recording of the notice of election and demand for sale, whether by

deed, mortgage, judgment or any other instrument of record. In giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address which is given in the recorded instrument evidencing such person's interest, except that 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. The clerk shall fix a time not less than 21 nor more than 35 days after the filing of the motion and a place for the hearing of such motion.

(b) Notice; Contents; Service. The moving party shall issue a notice describing the instrument containing the power of sale, the property sought to be sold thereunder, and the default or other facts upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to the right to file and serve responses as provided in section (c), including a reference to the last day for filing such responses and the addresses at which such responses must be filed and served. The notice shall contain the following advisement: "If this case is not filed in the county where your property is located, you have the right to ask the court to move the case to that county. Your request may be made as a part of your response or any paper you file with the court at least 7 days before the hearing." The notice shall contain the return address of the moving party. Such notice shall be served by the moving party not less than 14 days prior to the date set for the hearing, by:

(1)mailing a true copy thereof to each person named in the motion (other than persons for whom no address is stated) at the address or addresses stated in the motion; (2)and by filing a copy with the clerk and by delivering a second copy to the clerk for posting by the clerk; and (3)if a residential property as defined by statute, by posting a true copy in a conspicuous place on the subject property as required by statute. Such mailing and delivery to the clerk for posting, and property posting shall be evidenced by the certificate of the moving party or moving party's agent. For the purpose of this section, posting 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; Contents; Filing and Service. Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing sale may file and serve a response to the motion, verified by the oath of such person, setting forth the facts upon which he relies and attaching copies of all documents which support his position. The response shall be filed and served not less than 7 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and legal holidays, C.R.C.P. 6(a) notwithstanding, unless the last day of the period so computed is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next succeeding day which is not a Saturday, Sunday or a legal holiday. Service of such response

upon the moving party shall be made in accordance with C.R.C.P. 5(b). C.R.C.P. 6(e) shall not apply to computation of time periods under this section (c).

(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. 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 required by the Service Member Civil Relief Act (SCRA), 50 U.S.C. § 520, 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 Service Member Civil Relief Act, and shall summarily grant or deny the motion 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 moving party. 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.

(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation (i) as to which the obligor is a natural person, and (ii) 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 thereof is located. Any proceeding under this Rule which 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 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 such sale to be made to the court, and if it appears

therefrom that such sale was conducted in conformity with the order authorizing the sale, the court shall thereupon enter an order approving the sale.

(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.