

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

In re:

GLORIA JEAN CANNADY,

Debtor.

Bankruptcy Case No. 19-15400 EEB

Chapter 13

JOSUE ZANICAY PEREZ ORTEGA,

Plaintiff,

v.

GLORIA JEAN CANNADY,

Defendant.

Adversary Proceeding No. 19-1335 EEB

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment. Both Plaintiff and the Debtor have asserted competing claims to a home located at 662 S. Fulton Street, Denver, CO 80247 (the "Property"). While the Debtor once held joint title to the Property with her former spouse, Cama Plan FBO IRA Account # TO90415 ("Cama Plan") acquired title through a foreclosure sale in 2013. On March 15, 2019, Plaintiff purchased the Property from Cama Plan. Nevertheless, the Debtor has remained in possession of the Property and refuses to vacate it. Plaintiff filed this adversary proceeding seeking a declaration that he is the bona fide purchaser of the Property, he owns it free and clear of any claims of the Debtor, and the Property is not part of the Debtor's bankruptcy estate.

I. BACKGROUND

The Debtor did not file a timely response to the Motion. Therefore, pursuant to L.B.R. 7056-1(d), she is deemed to have admitted the following pertinent facts set forth in Plaintiff's Motion:

1. The Debtor and her former husband acquired the Property by a warranty deed, dated July 15, 2005 and recorded on August 3, 2005 at Reception No. 200128465, in the records of the City and County of Denver.

2. Cama Plan was the holder of a debt that the Debtor and her former husband owed, which was secured by a deed of trust on the Property.
3. In 2012, Cama Plan commenced a foreclosure against the Property by recording a Notice of Election and Demand with the Public Trustee for the City and County of Denver.
4. On November 7, 2013, the Denver County District Court entered an order authorizing the foreclosure sale of the Property.
5. Cama Plan purchased the Property at the foreclosure sale on December 5, 2013 and the Public Trustee recorded a Certificate of Purchase reflecting its purchase on December 9, 2013.
6. The Public Trustee executed and recorded a Public Trustee's Confirmation Deed, on January 3, 2014 at Reception No. 2014000461, in the records of the City and County of Denver (the "Confirmation Deed").
7. Through the Confirmation Deed, the Public Trustee confirmed that the foreclosure sale conveyed the Property to Cama Plan.
8. Plaintiff purchased the Property from Cama Plan on March 15, 2019 for \$410,000.
9. Cama Plan conveyed the Property to Plaintiff by warranty deed, dated March 15, 2019 and recorded on March 20, 2019 at Reception No. 2019032161, in the records of the City and County of Denver.
10. When he purchased the Property, Plaintiff did not have actual knowledge of the Debtor or of her claimed interest in the Property.
11. After Plaintiff purchased the Property, he discovered that the Debtor was still occupying it. He commenced litigation in state court to obtain possession.
12. The Debtor filed a chapter 13 petition in this Court on March 29, 2019 (Case No. 19-12424 EEB).
13. The Court dismissed Case No. 19-12424 EEB on May 1, 2019.
14. Plaintiff then continued his efforts in state court to obtain possession of the Property.
15. The Debtor filed this pending chapter 13 case (Case No. 19-15400 EEB) on June 24, 2019.
16. In documents filed in the present bankruptcy case, the Debtor has asserted a 100% ownership interest in the Property and lists Plaintiff as a creditor.

17. Plaintiff has never loaned the Debtor any money or otherwise entered into any agreements with her, financial or otherwise.

18. At the present time, the Debtor remains in possession of the Property.

II. DISCUSSION

A. Summary Judgment Standards

Federal Rule of Civil Procedure 56(a), made applicable to this adversary proceeding through Fed. R. Bankr. P. 7056, provides that a court may award summary judgment if there is no material issue of fact to be tried, and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In applying this standard, this Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The movant bears the burden of showing that no genuine issue of material fact exists. *Sports Unlimited, Inc. v. Lankford Enter., Inc.*, 275 F.3d 996, 999 (10th Cir. 2002). If the moving party makes a prima facie case, the burden then shifts to the non-moving party to timely set forth specific facts demonstrated by evidence, “from which a rational trier of fact” could find in its favor. *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000). The opposing party may not rest on the allegations contained in the pleadings but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. United States*, 622 F.2d 516, 519 (10th Cir.1980). These facts may be shown “by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves.” *Celotex*, 477 U.S. at 324. The non-moving party must provide “significant probative evidence” tending to support her claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

B. Cama Plan’s Foreclosure Extinguished the Debtor’s Legal Ownership Interest in the Property

Under 11 U.S.C. § 541(a),¹ the filing of a bankruptcy case creates an estate comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” A debtor’s property interests “are created and defined by state law.” *Butner v. United States*, 440 U.S. 48, 55 (1979). Colorado law controls the nature of the Debtor’s property interests in this case.

In Colorado, a public trustee’s foreclosure sale enables the holder of a promissory note to obtain title to property encumbered by a deed of trust in satisfaction, or partial satisfaction, of the note. Colorado’s public trustee foreclosure statutes specifically provide that, after a foreclosure sale, title to the property vests in the foreclosure sale purchaser, subject to junior lienors’ rights of redemption. *Mayotte v. U.S. Bank Nat’l Ass’n as Trustee for Structured Asset Inv. Loan Tr. Mortgage Pass-*

¹ All further references to § or “section” are to the Bankruptcy Code, Title 11, United States Code, unless specifically identified otherwise.

Through Certificates, Series 2006-4, 880 F.3d 1169, 1172 (10th Cir. 2018). The controlling statute states:

Upon the expiration of all redemption periods allowed to all lienors entitled to redeem . . . or, if there are no redemption periods, upon the close of the officer's business day eight business days after the sale, title to the property sold shall vest in the holder of the certificate of purchase or in the holder of the last certificate of redemption in the case of redemption. . . . No earlier than ten business days nor later than fifteen business days after both the title vests and the officer has received all statutory fees and costs, the officer shall execute and record a confirmation deed . . . to the holder of the certificate of purchase or, in the case of redemption, to the holder of the last certificate of redemption confirming the transfer of title to the property Failure of the officer to execute and record such deed or to record the deed within the time specified shall not affect the validity of the deed or the vesting of title.

Colo. Rev. Stat. § 38-38-501(1) (2019) (emphasis added).

Pursuant to the plain language of this statute, if there is no redemption by a junior lienor, title to the property automatically vests in the foreclosure sale purchaser eight business days after the foreclosure sale or after the expiration of all redemption periods, whichever is later. The public trustee's deed merely confirms that title has vested in the foreclosure sale purchaser. *Telluride Resort & Spa, L.P. v. Colorado Dep't of Revenue*, 20 P.3d 1212, 1214 (Colo. App. 2000).

In applying Colorado's public trustee foreclosure statutes, many courts have held that a foreclosure sale terminates the owner's interest in property and transfers that interest to the foreclosing creditor or any junior lienor who redeemed the property. Before discussing the relevant case law, however, it is important to note that Colorado's legislature substantially amended its foreclosure statutes in 2006. Current law, which applies to all public trustee foreclosure sales commenced after January 1, 2008, expands the time prior to a foreclosure sale during which an owner may cure monetary defaults under the loan, but eliminated the post-sale owners' right of redemption. In cases determined prior to 2008, courts referred to a borrower's right of redemption and discussed how the transfer of title following a foreclosure sale did not occur until all rights of redemption terminated, including both the owners' and the junior lienors rights of redemption. Nevertheless, the cases decided under the prior statute clearly demonstrate that, following all applicable redemption periods, a completed foreclosure sale extinguishes the owner's interest in property and transfers legal title to the purchaser at the foreclosure sale. Since the foreclosure sale relevant to this case occurred after January 1, 2008, the Debtor and her ex-spouse had no rights of redemption. Therefore, they lost all their ownership rights eight business days after the foreclosure sale occurred. Keith Gantenbein, 13 *Colo. Prac., Civ. Proc. Forms & Comment.* § 120:2 (3d ed. June 2020 update).

Prior case law confirms this result. In *Mount Carbon Metro. Dist. v. Lake George Co.*, 847 P.2d 254 (Colo. App. 1993), a property owner sued its lender to stop foreclosure. The lender obtained summary judgment in its favor, allowing the foreclosure sale to proceed. While the owner moved to stay the judgment, the trial court never ruled on the motion. In the absence of a stay, the public trustee proceeded with the foreclosure. Under applicable law at that time, the owner had the right to redeem but failed to do so. In the absence of redemption, the court concluded that the foreclosure was “final and all of the owner’s right, title, and interest in and to the land [was] extinguished.” *Id.* at 257.

In *Telluride Resort & Spa, L.P. v. Colorado Dep’t of Revenue*, 20 P.3d 1212, 1214 (Colo. App. 2000), the court analyzed whether the assignment of a public trustee’s certificate of purchase effected a taxable transfer of property. The court ruled that, after a foreclosure sale and in the absence of any redemption, title vests in the holder of the certificate of purchase and the public trustee’s deed confirms the transfer of title. In affirming this decision, the Colorado Supreme Court concluded that the grantee of the public trustee’s deed “acquired title to and full use of the property.” *Telluride Resort and Spa, L.P. v. Colo. Dep’t of Revenue*, 40 P.3d 1260, 1266 (Colo. 2002). See also *Baber v. Baber*, 474 P.2d 630, 631 (Colo. App. 1970) (applying statutes governing judicial foreclosure of deeds of trust and holding that “when the owner’s right of redemption expires, all his right, title and interest in and to the land is extinguished”).

In *In re Roberts*, 367 B.R. 677 (Bankr. D. Colo. 2007), the debtor filed her bankruptcy case following a public trustee’s foreclosure sale, the expiration of all redemption periods, and the public trustee’s issuance of a deed to the foreclosing creditor. The lender then moved for relief from stay so it could file an action in state court to evict the debtor. The bankruptcy court analyzed whether the debtor had any ownership interest in the property at the time of her bankruptcy filing. It reasoned that the public trustee’s deed manifested “the fact that the foreclosure process that is fully controlled by Colorado state law has run its course” and that the public trustee’s deed “is prima facie evidence of [the lender’s] ownership of the [p]roperty.” *Id.* at 687. Accordingly, it ruled that the debtor had no legal or equitable interest in the property that became property of her bankruptcy estate. *Id.* at 687-88. The debtor had only a naked possessory interest because fee simple ownership clearly vested in the lender prepetition under Colorado law. *Id.* at 688.

Colorado’s law reflects the purpose behind all secured transactions -- to allow a creditor to exercise its rights, including the ability to obtain ownership of its collateral if its borrower fails to pay the debt. It follows by necessity that the property owner retains no legal interest in the property after the foreclosure process is complete. As one authority has observed, the title a lender acquires through foreclosure:

draws to it the subordinate legal title of the mortgagor, and his or her title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser takes the title of the mortgagor as of the time when the mortgage lien was created.

The effect of the foreclosure sale is to vest in the purchaser the entire interest and estate of the mortgagor and the mortgagee as of the date of the mortgage, unaffected by subsequent action.

55 Am. Jur. 2d *Mortgages* § 719 (August 2020 update) (footnotes omitted).

In this case, Cama Plan was the successful bidder at the foreclosure sale and no party permitted to redeem under Colorado law actually elected to redeem. Thus, title to the Property vested in Cama Plan at the close of business on December 19, 2013, eight business days after the sale. The subsequent public trustee's deed merely confirmed this fact. It was the foreclosure sale itself that extinguished any legal interest of the Debtor and her former husband in the Property. Following the transfer of title to it, Cama Plan was free to transfer fee simple title to the Property, which it did when it sold the Property to the Plaintiff in March 2019. When the Plaintiff purchased this Property, he did so free and clear of any interest of the Debtor. While she remains in possession of the Property, she has no legal right to do so.

C. Plaintiff's Request for a Finding of Bona Fide Purchaser Status

Plaintiff asserts that he was a bona fide purchaser of the Property and requests the entry of a declaratory judgment to that effect. Under Colorado law, to be a bona fide purchaser of real property, one must pay value for the property, act in good faith, and lack notice of any defect in title to the property. *Himes v. Schiro*, 711 P.2d 1281, 1283 (Colo. App. 1985). It is undisputed that Plaintiff paid \$410,000 to purchase the Property from Cama Plan. There are no facts indicating that Plaintiff acted other than in good faith in purchasing the Property. Thus, Plaintiff has demonstrated two of the necessary elements. The third element is more problematic.

Colorado courts recognize three forms of notice by which a purchaser is charged with knowledge of the rights another party claims in real property: actual notice, constructive notice, and inquiry notice. *Martinez v. Affordable Housing Network, Inc.*, 123 P.3d 1201, 1206 (Colo. 2005) ("*Martinez*"). It is undisputed that, when Plaintiff purchased the Property, he had no actual knowledge that the Debtor claimed any interest in it. Nor did he have constructive knowledge of the Debtor's claimed interest. Constructive knowledge arises where a search of the title records would have shown a defect. *Id.* Here, a title search would only have shown that Cama Plan acquired title through a foreclosure sale. Thus, Plaintiff would not have obtained constructive notice of any defect in Cama Plan's ownership from the title records.

On the other hand, "[i]nquiry notice arises when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another." *Id.* (quoting *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 (Colo. 2003)). Here, Plaintiff admits that the Debtor was occupying the Property when he purchased it. Her affidavit states that she or her family members have lived in the Property since May 2012. Colorado law recognizes that possession of real estate is sufficient to put a purchaser on inquiry notice of any legal or equitable claim that the party in possession may have. *Id.* at 1207.

In this regard, the *Martinez* case is once again instructive. There, an equity skimming firm fraudulently obtained a quit-claim deed from the owners of a home while promising to help them cure their mortgage default, avoid foreclosure, and sell their home. The owners of the property remained in possession and later decided they did not want to sell their home. But in the meantime, the equity skimmer sold the property to a third party. Because title to the property had twice been conveyed by quit-claim deed without satisfaction of the mortgage and because the owners remained in possession, the Colorado Supreme Court held that the purchaser was charged with knowledge of the equity skimmer's fraud because he would have learned of it had he made a reasonable inquiry of those in possession of the property. *Id.* at 1208-09.

In this case, Plaintiff purchased the Property from a former lienholder more than five years after the lienholder acquired title to the Property through foreclosure. Yet, one of the former borrowers still remained openly in possession of the Property when Plaintiff purchased it. A reasonable buyer in Plaintiff's position would have asked the Debtor why she remained in the home. Had Plaintiff made that inquiry, the Court assumes the Debtor would have asserted the same arguments she has made here to justify her claim to the Property. If she had viable grounds to set aside Cama Plan's foreclosure sale or to assert an equitable interest in the Property, Plaintiff is charged with inquiry notice of those claims and took his title to the Property subject to them. For this reason, the Court cannot enter a finding that the Plaintiff is a bona fide purchaser. Nevertheless, as discussed below, it is not necessary for the Court to make this finding.

D. Analysis of the Debtor's Claims

As the non-moving party in this summary judgment context, the Debtor had the burden to demonstrate, by "citing to particular parts of materials in the record, including . . . documents [or] affidavits" that there are disputes of fact sufficient to demonstrate she has an interest in the Property. Fed. R. Civ. P. 56(c)(1)(A). The Debtor did not file a timely response to Plaintiff's motion for summary judgment. Instead, after the deadline had passed, the Debtor moved for an extension of time. The Court denied her request, finding that the Debtor was well aware of the deadline and the Court's intent that the matter be resolved expeditiously. Nevertheless, the Debtor filed a response seven days later. However, in the interest of greater finality and because it will not change the result here, the Court declines to strike the Debtor's response and will consider it. But, as noted above, pursuant to L.B.R. 7056-1, the undisputed facts set forth in Plaintiff's motion are no longer subject to challenge.

The Debtor's response is disorganized, repetitive, and difficult to parse, but the Court has endeavored to construe her arguments liberally because she appears pro se. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). In applying this principle, the Court has considered whether, despite the Debtor's unfamiliarity with legal formalities, her arguments raise any valid claim to the Property. *Id.* At the same time, it is not proper for the Court to assume the role of advocate for any pro se litigant and the Court is not required to go beyond the materials the Debtor has submitted in response to the motion for summary judgment to make her case for her. *Id.*; *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998).

1. The Debtor's Claims of Fraud and Conspiracy in Connection with the Foreclosure Sale

Though it is extremely difficult to discern from her response, the Debtor's primary argument appears to be that Cama Plan is her ex-husband's individual retirement account ("IRA"). The Court's most generous construction of her assertions is that, as a fraudulent scheme to deprive her of her interest in the Property, her ex-husband conspired with or caused Cama Plan to acquire the deed of trust from the prior lender and thereby eliminate her interest in the Property through foreclosure. As the party opposing summary judgment, it was the Debtor's burden to provide the Court with specific facts supported by probative and admissible evidence that would allow a rational trier of fact to make these findings. *Whitesel v. Sengenberger*, 222 F.3d at 867; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249; *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d at 671. To accomplish this, "the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Adler*, 144 F.3d at 671. To defeat a motion for summary judgment, the Debtor's evidence must be more than "mere speculation, conjecture, or surmise." *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir.1999). Conclusory and self-serving affidavits are not sufficient. *Hall v. Bellmon*, 935 F.2d at 1111. The Debtor has failed to meet this burden.

It is true that, under Colorado law, a court may set aside a foreclosure sale when the purchaser has engaged in fraud, deceit, or collusion. *Johnson v. Smith*, 675 P.2d 307, 310 (Colo. 1984). But in this case, the Debtor's claims of such misconduct lack any factual support. First, she has provided no evidence that Cama Plan is her ex-husband's IRA. Even if it is, the Debtor has not disputed the validity of the original loan secured by the deed of trust that Cama Plan acquired and foreclosed upon, nor does she dispute that the loan was in default when Cama Plan commenced foreclosure. While she notes that Cama Plan obtained the assignment of the deed of trust on the Property in May 2012, this was about seven months prior to her divorce in December 2012. She makes no claim that she was unaware of this deed of trust in the divorce proceedings. While she claims that Cama Plan fraudulently prevented her from redeeming the Property, in fact, she had no right to redeem under current law. Thus, in the absence of even a scintilla of evidence to support her claim, the Debtor's bare assertions are insufficient to raise a triable issue of fact to invalidate the foreclosure sale based on fraud, conspiracy, or collusion.

2. The Debtor's Claims Regarding HSBC's Cloud on the Title

The Debtor claims that the lien of the first mortgage lender on the Property, HSBC, became a "cloud on the title" because HSBC entered into a stipulated judgment sanctioning it for abusive mortgage lending and foreclosure practices. With her response, the Debtor submitted a copy of a partially handwritten caption of a legal document that purports to be a notice of lis pendens in a 2018 lawsuit between the Debtor and HSBC. This document contains no information other than the case caption. It is not certified, not signed by any party, does not contain recording information demonstrating that it was filed in the real estate records, and it has no information about any claims the Debtor may have asserted against HSBC. In short, it is wholly

insufficient to evidence any valid claim that would constitute a “cloud on the title.” Moreover, HSBC was not the foreclosing lender. Apparently, the Plaintiff purchased the Property either subject to HSBC’s senior mortgage or he paid off this lien at the time of his purchase from Cama Plan. Whatever claims the Debtor may have had against HSBC are irrelevant to the transfer of title that occurred when the second mortgage holder, Cama Plan, sold the Property to the Plaintiff.

3. Alleged Errors or Fraud in the Divorce Case

The Debtor’s response also disputes the fairness and propriety of her 2012 divorce case. The Debtor argues that the judge in that case should have recused herself, that the Debtor was not notified of the permanent orders hearing, that there were numerous other errors committed, and that she never complied with the divorce court’s order that she must sign a quit-claim deed conveying the Property to her ex-husband and vacate the Property by January 2013. The Debtor contends, without any competent supporting evidence other than a single self-serving statement in her affidavit, that her appeal of the divorce court’s orders remains pending and is “abated.”²

Regardless of the existence of any legal errors in the divorce case and despite whether the divorce court’s orders are final or still subject to appeal, these arguments are irrelevant to the issue of title to the Property. Plaintiff does not claim he acquired title to the Property through the divorce court or from the Debtor’s ex-husband. Instead, he acquired it from Cama Plan. According to the undisputed facts, Cama Plan foreclosed a deed of trust that the Debtor and her husband executed in 2005, seven years before their divorce. As described above, and in the absence of any evidence supporting the Debtor’s claim that the foreclosure was fraudulent or collusive, the foreclosure transferred to Cama Plan all the interest that the Debtor and her husband had in the Property in 2005 when they signed the deed of trust. The foreclosure cut off all junior ownership interests in the Property, including any that the Debtor’s ex-husband may have acquired through the divorce proceedings. Even if the Debtor succeeded in her appeal, the reversal of the divorce court’s 2012 orders would not invalidate the 2005 deed of trust, the public trustee’s deed to Cama Plan, or Cama Plan’s warranty deed to Plaintiff.

The Debtor argues that, because her ex-husband committed fraud in the divorce proceedings, she holds a constructive trust on a one-half interest in the Property. Under Colorado law, a constructive trust is “an equitable device used to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.” *In re Marriage of Allen*, 724 P.2d 651, 656–57 (Colo. 1986) (citing *Restatement of Restitution* § 160 (1937) and 7 G. Bogert, *The Law of Trusts and Trustees* § 471 at 3 (1978)). “When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest,

² Apparently in attempt to support this contention, the Debtor submitted an uncertified copy of what appears to be the last page of an order regarding the stay of an unidentified appeal because of the automatic stay. The purported order is unsigned and the signature block for the unidentified court is incomplete.

equity converts him into a trustee.” *Page v. Clark*, 592 P.2d 792, 798 (1979) (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919)). The purpose of the remedy is to prevent the defendant from being unjustly enriched at the plaintiff’s expense. *Allen*, 724 P.2d at 657.

The Debtor relies on *In re Pardee*, 433 B.R. 377 (Bankr. N.D. Okla. 2010), to support her constructive trust claim. In that case, the debtor’s husband and his former wife had a post-nuptial agreement that divided the husband’s retirement accounts on his death. At the time of his death, however, the husband had remarried and his second wife took control over all the retirement funds, including those promised to his first wife. The former wife sued the second wife in state court and the state court imposed a constructive trust on the retirement funds promised to the first wife. The second wife then filed bankruptcy. Despite the debtor’s protests to the contrary, the bankruptcy court ruled that, under the *Rooker Feldman* doctrine, it could not modify or set aside the state court order imposing the constructive trust. It held that the promised retirement funds were not property of the debtor’s bankruptcy estate. *Id.* at 388.

Here, however, there was no judgment in state court or otherwise imposing a constructive trust on the Property for the Debtor’s benefit. Prior to a judgment, a claim for a constructive trust is merely a claim for a legal remedy and does not afford the claimant an interest in any particular property. See *Parker v. Handy (In re Handy)*, 624 F.3d 19, 22 (1st Cir. 2010) (holding that, in the absence of a lien, attachment, or provisional remedy, a request for a constructive trust does not of itself give rise to an *in rem* claim; constructive trusts are remedial devices employed by courts once liability is found and where equity requires). Moreover, the time for the Debtor to have asserted this claim has long since passed – at least in terms of her ability to exercise rights to this Property. Either she failed to raise her constructive trust claim in the divorce court and again prior to the foreclosure sale, or else she raised it and the state court ruled against her. The completion of the foreclosure sale and the subsequent sale of the Property to the Plaintiff has cut off her ability to assert a constructive trust claim now against the Property.

4. Cama Plan’s Authority to Foreclose the Deed of Trust

The Debtor argues that Cama Plan lacked authority to foreclose its deed of trust because the assignment of the deed of trust to Cama Plan was invalid. According to the documents Plaintiff submitted with his Motion, the Debtor and her husband encumbered the Property with a deed of trust for the benefit of Lenders Direct Capital Corporation (“Lenders Direct”) on July 21, 2005. Lenders Direct, through its nominee, Mortgage Electronic Registration Systems Inc., assigned the deed of trust to Partners for Payment Relief DE III, LLC (“Partners”) on November 22, 2011. Partners assigned the deed of trust to Cama Plan on May 1, 2012. Cama Plan began its public trustee’s foreclosure action on October 17, 2012. The Debtor does not challenge, and is deemed to have admitted, the fact that, at the time Cama Plan commenced the public trustee’s foreclosure, it was the holder of the debt originally owed to Lenders Direct.

Furthermore, the information contained in the Assignment of Mortgage from Partners to Cama Plan matches Cama Plan's Notice of Election and Demand and the assignment from Lenders Direct to Partners with respect to the lender's name, date of execution, recording date, recording information, and original amount of the Lenders Direct deed of trust. The Debtor does not challenge that this identifying information is accurate. The Assignment of Mortgage to Cama Plan correctly described the Property's address. However, it did not contain the Debtor's name as one of the original borrowers on the deed of trust -- it only listed her ex-husband's name. The Debtor argues that because of this defect, the assignment to Cama Plan was invalid and void.

This argument fails for two reasons. First, the assignment adequately described the Lenders Direct deed of trust. The omission of the Debtor's name as one of the original borrowers appears to be a scrivener's error and the remaining accurate information sufficiently demonstrates that Partners intended to assign the original Lenders Direct deed of trust to Cama Plan. The minor error that the Debtor identified does not rise to the level of impropriety necessary to challenge a foreclosure sale -- especially since she has not shown that the omission of her name on the assignment prejudiced her in any way. See *Amos v. Aspen Alps 123, LLC*, 280 P.3d 1256, 1260 (Colo. 2012) (declining to set aside a foreclosure sale where procedural irregularities in notice did not injure or harm the complaining party). Although the Court was unable to find any Colorado decisions on this exact point, courts from other jurisdictions have held that a scrivener's error in the assignment of a deed of trust does not invalidate a foreclosure sale. See, e.g., *Stebbins v. Bank of New York Mellon Trust Co., N.A.*, 325 F. Supp. 3d 216 (D. Mass 2018) (holding that former property owner had no standing to challenge foreclosure sale based on scrivener's error in the name of the assignor of a deed of trust); *Iqbal v. Bank of America, N.A.*, 559 Fed. Appx. 363 (5th Cir. 2014) (unpublished opinion) (ruling that scrivener's error in property description in mortgage assignment did not invalidate foreclosure sale); *Veasley v. Fed. Nat'l Mort. Ass'n*, 623 Fed. Appx. 290 (6th Cir. 2015) (unpublished opinion) (absent a showing of prejudice, borrower could not challenge foreclosure sale because assignment of mortgage that correctly identified property's street address contained incorrect metes and bounds legal description).³

Moreover, under Colorado law, the holder of a debt may exercise a power of sale contained in a deed of trust without obtaining an assignment of the deed of trust. Under Colo. Rev. Stat. § 38-38-101(1)(a)-(c), the holder of a note may commence a foreclosure by filing with the public trustee a notice of election and demand for sale, the original note with an assignment to the current holder, if appropriate, and the *original* deed of trust. It is not necessary for the foreclosing creditor to show that the deed of trust has been assigned to it because, under Colorado law, the assignment of a note

³ The Debtor does not identify any prejudice caused by the omission of her name from the assignment. According to Colorado statutes, because she was one of the original grantors of the deed of trust, Cama Plan was required to include the Debtor's name on the list it provided to the public trustee for the purpose of mailing notice of the foreclosure sale to interested parties. See C.R.S. §§ 38-38-103(1)(a); 38-38-100.3(14)(a).

automatically carries the deed of trust with it. *Stetler v. Scherrer*, 226 P. 858, 859 (Colo. 1924).

In *Smith v. Bank of New York (In re Smith)*, 366 B.R. 149 (Bankr. D. Colo. 2007), the debtor sued to avoid a creditor's lien after the creditor had foreclosed its lien and obtained a public trustee's deed. The debtor challenged the lien under § 544, contending that the lien was unperfected because there was no assignment of the deed of trust on record. In rejecting the debtor's argument, the court relied on the *Stetler* case and ruled that whether the foreclosing creditor had an assignment of the deed of trust was not relevant because proof that the creditor was the holder of the note was conclusive as to the creditor's interest in the deed of trust. *Id.* at 151-52. The *Smith* court also relied on a more recent case in which the Colorado Supreme Court observed that, "[b]etween the parties to a transfer the assignment or negotiation of the note itself is all that must be done. It is unnecessary to have any separate document purporting to transfer or assign the mortgage on the real estate, for it will follow the obligation automatically." *Columbus Investments v. Lewis*, 48 P.3d 1222, 1226 n. 4 (Colo. 2002) (quoting 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law*, 429 (4th ed. 2001)).

To commence a foreclosure sale in Colorado, the mortgage lender must present the original note or a surety bond, unless it is a "qualified holder." Colo. Rev. Stat. § 38-38-101. A "qualified holder" is defined as a bank, savings and loan, supervised lender, public entity, FHA lender, federal or state credit union, the federal government, a community development financial institution, or similar types of entities. Colo. Rev. Stat. § 38-38-100.3(20). As an IRA, Cama Plan would not be deemed a qualified holder and, therefore, it would have had to present the original note, with necessary endorsements, or a surety bond. By not timely responding to Plaintiff's summary judgment motion, the Debtor has admitted that Cama Plan was the assignee/holder of the note that the Debtor and her former spouse originally executed for the benefit of Lenders Direct.

Here, the undisputed facts demonstrate that Cama Plan was the holder of a debt secured by a deed of trust on the Property at the time it instituted its public trustee foreclosure sale. As such under Colorado law, Cama Plan could exercise the power of sale in the Lenders Direct deed of trust regardless of whether or not it had obtained a valid assignment of that deed of trust. Therefore, any error in the assignment from Partners to Cama Plan is irrelevant and provides no basis to challenge the title Cama Plan obtained through its foreclosure and later transferred to Plaintiff.

5. Whether Cama Plan's Acquisition of the Note Violated the Tax Code

Without any supporting evidence, the Debtor contends that Cama Plan was her ex-husband's IRA. She next argues that Cama Plan's acquisition of a loan on the Property was a "prohibited transaction" under the Internal Revenue Code (the "Tax Code") that "voids the IRA from its inception." The Tax Code defines a "disqualified person" as, among other things, a "fiduciary" of a retirement plan. 26 U.S.C. § 4975(e)(2). A "fiduciary" is defined in 26 U.S.C. § 4975(e)(3) as a person who

exercises any discretionary authority or control over the management or disposition of the assets of a retirement plan. Under 26 U.S.C. § 4975(c), a “prohibited transaction” includes the sale, exchange, or leasing of any property between a plan and a disqualified person, the lending of money or other extension of credit between a plan and a disqualified person, the transfer to, or use by or for the benefit of, a disqualified person of the assets of a plan, and any act by a fiduciary where he deals with the income or assets of a plan in his own interest or for his own account.

But even if the Debtor’s former husband was a “disqualified person” and Cama Plan’s acquisition of the second deed of trust in 2012 was a “prohibited transaction” under the Tax Code, Cama Plan as an IRA did not become “void.” Nor did it lose its ability to obtain title through foreclosure or to transfer title to the Property as a result. If an IRA engages in a prohibited transaction, the IRA owner merely loses the tax shelter benefit of his IRA. The fair market value of all the assets in the account is deemed distributed to the disqualified person and included in that person’s gross income. 26 U.S.C. § 408(e)(2). *See also Yerian v. Webber (In re Yerian)*, 927 F.3d 1223 (11th Cir. 2019) (recognizing that IRA lost “tax-exempt status” when owner/beneficiary resided in a condominium the IRA owned).

The Debtor has not provided the Court with any legal authority that imposes a different or additional consequence due to a prohibited transaction than the severe tax penalty the Internal Revenue Service imposes. Where a statute imposes a specific penalty for a violation, this Court is not at liberty to impose a different or additional one. Moreover, the Debtor’s theory that an IRA that engages in a prohibited transaction loses its ability to transfer property would lead to absurd and untenable results – completely prohibiting any further transfer of the property involved.

6. Use of Avoidance Powers to Invalidate the Foreclosure Sale or Cama Plan’s Deed to Plaintiff

The Debtor argues that certain transfers related to Plaintiff’s acquisition of the Property are avoidable under §§ 544, 547, and/or 548 of the Bankruptcy Code. But she has not commenced an adversary proceeding to avoid any transfer and, as a chapter 13 debtor, her standing to do so is limited. In *Hansen v. Green Tree Servicing, LLC (In re Hansen)*, 332 B.R. 8 (10th Cir. BAP 2005), a chapter 13 debtor attempted to avoid a lien under § 544, alleging that the creditor had failed to perfect its lien. The Bankruptcy Appellate Panel, while noting a split in authority, followed what it viewed as the better reasoned authority and held that chapter 13 debtors have standing to exercise the Code’s avoidance powers only under the limited circumstances described in § 522(h). The *Hansen* court contrasted chapters 11 and 12 of the Code, which explicitly permit debtors to exercise a trustee’s avoidance powers, with chapter 13, which conspicuously lacks any such provision. *Hansen*, 332 B.R. at 12. The *Hansen* court also observed that § 1303 enumerates the rights and powers of a chapter 13 debtor but omits any reference to avoiding powers. *Id.* Finally, the *Hansen* court reasoned that § 522(h) shows that Congress knew how to confer avoidance powers on debtors when it deemed appropriate. *Id.* at 13. This Court agrees with this reasoning and the conclusion of the *Hansen* court. Accordingly, the Debtor in this chapter 13 case

may only avoid transfers if she meets the conditions set forth in § 522(h). See *Balck v. Hoffman (In re Balck)*, 2011 WL 6130418, *4 (Bankr. D. Colo. Dec. 8, 2011) (noting that trustee, not the debtor, exercises most avoidance powers in chapter 13).

Under § 522(h), a debtor may only avoid a transfer if she meets three conditions. First, the debtor must show that she could exempt the property under § 522(g). Second, she must demonstrate that a bankruptcy trustee could avoid the transfer under §§ 544, 545, 547, 548, 549, or 724(a), or recover it under § 553. And finally, she must assert that the trustee has not attempted to avoid the transfer. In this case, the Court need not address the first and third elements of § 522(h) because it is clear the Debtor cannot demonstrate the second element.

Although it is not entirely clear which transfers the Debtor believes are avoidable or on what basis, she states repeatedly that “Cama Plan transferred the property to conceal and remove with intent to hinder delay and defraud [the Debtor] from pursuit [sic] in good faith to redeem.” She refers to CUFTA, Colorado’s version of the Uniform Fraudulent Transfer Act, and *Lewis v. Taylor*, 375 P.3d 1205 (Colo. 2016), a case in which the court applied CUFTA to a Ponzi scheme. The Debtor states that the loan Plaintiff obtained from a third party to purchase the Property from Cama Plan was a preference. She also claims that the deed from Cama Plan to Plaintiff is a preference.

As discussed above, the Debtor has submitted no evidence to support her argument that Cama Plan’s foreclosure was collusive or fraudulent or that she has any other valid legal or equitable ownership claim to the Property. Moreover, the transfer from Cama Plan to Plaintiff did not involve a transfer “of property of the debtor,” or of “an interest in the debtor in property,” so a trustee could not avoid that transfer under §§ 544, 547, and/or 548. The transfer between Plaintiff and his lender clearly involved no property of the Debtor and was not made on account of an antecedent debt of the Debtor, so it is not avoidable as a preference.

To the extent the Court can construe the Debtor’s response as asserting that Cama Plan’s foreclosure is avoidable under §§ 544, 547, and or 548, that transfer occurred at the latest, on January 3, 2014, when the public trustee recorded the deed confirming the sale. The transfer occurred more than five years prior to the date the Debtor filed this bankruptcy case -- well outside the ninety-day look-back period under § 547 and outside the two-year look-back period under § 548. A trustee could not avoid the transfer under § 544 by exercising state law rights under CUFTA because under that statute, a cause of action is extinguished unless it is brought within four years after the transfer was made or, if later, within one year after the transfer was or could reasonably have been discovered by the claimant. Colo. Rev. Stat. § 38-8-110; *Lewis v. Taylor*, 375 P.3d at 1208.

Furthermore, the Debtor has presented the Court with no evidence beyond her bare allegations that Cama Plan acted with the intent to defraud her creditors when it foreclosed its deed of trust. Accordingly, she has not shown that a bankruptcy trustee could avoid any of the transfers related to Plaintiff’s ownership of the Property.

7. Debtor's Standing to Assert Her Claims

The two chapter 13 cases the Debtor filed in 2019 were not her first experiences with the Bankruptcy Court. She also filed a chapter 7 case in 2013. Even though Plaintiff did not raise this issue, this Court may *sua sponte* take judicial notice of matters contained in its own files and the effect of the Debtor's prior bankruptcy case on the claims she has asserted in this adversary proceeding. *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Co.*, 605 F.2d 1169, 1171-72 (10th Cir. 1979). In Case No. 13-14315 HRT, the Debtor filed a chapter 7 petition on March 21, 2013 and obtained a discharge on July 3, 2013. Although she was represented by counsel, and she signed her schedules under penalty of perjury, she did not list any ownership interest in the Property, but she did list the mortgage debts owed to HSBC and Lenders Direct as *unsecured* claims against her estate. Nor did she list any claims against her ex-husband or Cama Plan as assets. In her statement of financial affairs, she disclosed that she was divorced, that the divorce was "granted" within the year prior to her bankruptcy filing, and, in direct contradiction to her statements in this case, that she had quit-claimed her interest in a "residence at 622 Fulton Street [sic], Denver, Colorado 80247" to her former husband in January 2013, "pursuant to Separation Agreement."

If the Debtor had a valid claim to an equitable interest in the Property, a claim against her former husband for fraud or other misconduct in the divorce case, or a claim against Cama Plan regarding its acquisition of the second deed of trust or its initiation of foreclosure proceedings, she should have listed these claims in her schedules as they would have become property of her chapter 7 bankruptcy estate. *Clark v. Trailiner Corp.*, 2000 WL 1694299, at *1 (10th Cir. Nov. 13, 2000) (unpublished opinion). By failing to disclose them, they were not abandoned to her with the closing of her chapter 7 case. *Id.*; § 554(c), (d). If any valid claims exist, they remain property of her chapter 7 estate, and she lost all right to enforce these unsecured claims in her own name.

E. The Automatic Stay No Longer Prevents An Eviction Action

For the myriad of reasons described above, the Court has concluded that Plaintiff holds legal title to the Property and the Debtor has no valid legal or equitable claim to it. She has, however, remained in physical possession of the Property. Plaintiff has requested the Court to enter an order declaring that the automatic stay does not apply to any actions he may take to exercise his ownership and possessory interests in the Property.

Pursuant to § 362(a)(1), the commencement of a bankruptcy case operates as a stay "applicable to all entities" of "the commencement or continuation of . . . a judicial . . . action against the debtor that was or could have been commenced before" the bankruptcy case was filed. Under § 362(a)(3), the automatic stay prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Any action taken in violation of the automatic stay, including a judgment or order entered by another court, is void and without effect. *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990).

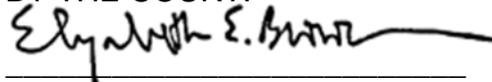
Section 362(c) governs the duration of the automatic stay. Ordinarily, the stay of an act against property of the estate continues “until such property is no longer property of the estate,” and the stay of any other act, including the commencement of a judicial action against the debtor, continues until the case is closed or dismissed, or until the debtor receives a discharge. § 362(c)(1) and (2). However, if a debtor files a second bankruptcy case within one year after the court dismissed the debtor’s prior case, the automatic stay “with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease” terminates “with respect to the debtor” thirty days after the debtor files the second case. § 362(c)(3)(A). Although the language of § 362(c)(3)(A) is not a model of clarity, courts within the Tenth Circuit have interpreted it to mean that the automatic stay terminates after thirty days with respect to the debtor and the debtor’s property, but not as to property of the estate. *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813, 816 (10th Cir. BAP 2008). Since this Court has held that the Debtor held no valid legal or equitable claim to the Property that became property of her bankruptcy estate, and because her repeat bankruptcy filing caused the automatic stay to terminate with respect to actions against her thirty days after her petition date in this case, the automatic stay no longer prevents Plaintiff from bringing an eviction action against the Debtor in state court.

III. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS that Plaintiff’s Motion for Summary Judgment is GRANTED. Judgment shall enter in favor of Plaintiff, and against the Debtor, declaring that the property located at 662 S. Fulton Street, Denver, CO 80247, and legally described as Lot 1, Block 1, Park Forest Filing No. 3, City and County of Denver, State of Colorado is not part of the Debtor’s bankruptcy estate. Plaintiff may proceed in state court to evict the Debtor from the premises.

DATED this 16th day of September, 2020.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge