

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 02-16621
	)	
CAROL RAPISARDA, aka	)	Chapter 7
CAROL RAPISARDA SHANKER,	)	
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

The chapter 7 trustee filed a second amended complaint in this adversary proceeding to resolve issues related to real property at 16903 Chillicothe Road, Chagrin Falls, Ohio owned by the debtor, Carol Rapisarda (the property). The defendants include the debtor, her husband Howard Shanker, and the law firm of McIntyre, Kahn & Kruse Co. LPA (the firm). The firm moves to deem admissions admitted and for summary judgment, and to extend the discovery deadline. (Docket 61, 62). The debtor opposes the firm's request regarding admissions and for summary judgment, but does not oppose the requested extension discovery. (Docket 65).

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (K).

## **DISCUSSION**

The chapter 7 trustee requests a determination as to the validity, priority, and extent of liens with respect to the property and for authority to sell the property. The firm claims an interest in the property by virtue of a mortgage which secures payment for its legal services. The trustee does not dispute this lien. The trustee has resolved all claims except for those made by the debtor and Mr. Shanker. The debtor did not respond to the second amended complaint. She did file an answer to an earlier complaint in which she admits that she does not have standing to claim an interest in the property or to deny the trustee's right to sell it. She has not made any claim against the firm. Mr. Shanker's claim is for a dower interest in the property.<sup>1</sup>

Following a January 27, 2005 pretrial, the court issued a scheduling order setting dates to govern further proceedings. The order informs the parties "that they are to make sincere, good faith efforts to resolve discovery disputes before seeking aid from the Court."

## **THE MOTIONS**

### **A. Motion to Deem Matters Admitted and Motion to Extend Discovery**

The firm submitted a number of discovery requests to the debtor including 11 requests for admission. The admission response date was February 28, 2005. On February 23, 2005, debtor's counsel sent a letter requesting an extension until March 22, 2005 because the debtor had been traveling. The letter stated further that the admissions were denied "for lack of information sufficient to form a belief," if the extension was not given. The firm declined to extend the response time based on the March 28, 2005 discovery cutoff.

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<sup>1</sup> The court struck the other parts of his pleading. *See* docket 57, 58.

Civil rule 36 deals with admission requests and provides in relevant part:

The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

FED. R. CIV. P. 36(a) (made applicable by FED. R. BANKR. P. 7036).

The firm views the debtor's response to its admissions request as a failure to admit or deny and asks that the matters be deemed admitted under rule 36(a). The debtor argues that her

response was a denial of the admissions request.

The correct procedure would have been for the debtor to serve an answer to the admissions that set out each admission and the debtor's response to it, including the basis for a denial based on lack of information. If the firm was dissatisfied with the response, then the firm could have moved for a determination as to the sufficiency of the denial. Since neither side followed the correct procedure, and because the issues raised in the admission requests are central to the dispute, the court finds under bankruptcy rule 7026 and 11 U.S.C. § 105 that the parties are to proceed as follows:

1. **On or before May 3, 2005**, the debtor is to serve an appropriate response to the firm's request for admissions which fully complies with rule 36 and is also to provide the answers to the interrogatories and the documents requested. As the debtor herself said these would be provided by March 22, 2005, this deadline should not cause any hardship to the debtor and it will not be further extended.
2. If the firm is dissatisfied with the responses, the firm may follow the rule 36 procedures.
3. The factual discovery deadline is extended to **June 3, 2005**. This is also a final extension.

#### **B. Motion for summary judgment**

Civil rule 56 provides for summary judgment:

- (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without

supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

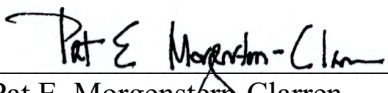
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

FED. R. CIV. P. 56(a) and (b) (made applicable by FED. R. BANKR. P. 7056). The firm requests summary judgment in its favor with respect to any defenses asserted by the defendant debtor and Howard Shanker as to the validity of the firm's mortgage. Summary judgment as requested is inappropriate for two reasons. First, the firm's request was premised on the admissions request and those matters have not been deemed admitted, so there is no factual basis for granting summary judgment. Second, rule 56 provides for summary judgment in favor of a party "against whom a claim, counterclaim, or cross-claim is asserted." The firm's summary judgment motion is directed to the debtor and Howard Shanker, not the trustee. While the debtor and Mr. Shanker both question the firm's mortgage, neither one of them has asserted a claim against the firm within the meaning of rule 56. Summary judgment is, therefore, not appropriate under the circumstances and the firm's motion is denied.

### CONCLUSION

\_\_\_\_\_The firm's motion to deem admissions admitted and for summary judgment is denied and the motion to extend factual discovery is granted. A separate order will be entered in accordance with this decision.

Date: 26 April 2005

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
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v.	)	<b><u>ORDER</u></b>
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

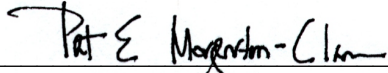
\_\_\_\_\_ For the reasons stated in the memorandum of opinion filed this same date, the motion of McIntyre, Kahn & Kruse Co., LPA to deem admissions admitted and for summary judgment is denied. (Docket 61).

**On or before May 3, 2005**, the debtor is to serve an appropriate response to the firm's request for admissions which fully complies with rule 36 and is also to answer the interrogatories and provide the documents requested.

The firm's motion to extend factual discovery is granted and the factual discovery deadline is extended to **June 3, 2005**. (Docket 62). No further extensions will be granted of either deadline.

IT IS SO ORDERED.

Date: 26 April 2005

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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