

THIS OPINION NOT INTENDED FOR PUBLICATION

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>
	)	<b><u>ON MOTION FOR SUMMARY</u></b>
CAROL RAPISARDA SHANKER, et al.,	)	<b><u>JUDGMENT</u></b>
	)	
Defendants.	)	

One of the defendants, the law firm of McIntyre, Kahn & Kruse Co., LPA, moves for summary judgment against co-defendants Carol Rapisarda Shanker and Howard Shanker regarding the validity and priority of a mortgage alleged by the firm to have been granted to it by Carol Shanker and Howard Shanker. The co-defendants oppose the motion. (Docket 93, 94, 95, 96, 98). For the reasons stated below, the motion is denied.

**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)(K) and (O).

## THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant “always bears the initial responsibility of informing the [trial] court of the basis for the motion, and identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file’ . . . that demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . .” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

## FACTS AND DISCUSSION

Although one would never know it from the volume and tone of the briefs filed in this case, the relevant facts are few and fairly straightforward. The debtor Carol Rapisarda Shanker filed her chapter 7 case on June 18, 2002, at which time she owned real property located at 16903

Chillicothe Road, Bainbridge, Ohio (the property). Her interest in that property became property of the chapter 7 estate. *See* 11 U.S.C. § 541(a). As part of the estate administration, the chapter 7 trustee filed a second amended complaint to determine the validity, priority, and extent of liens on the property and to sell it, with the proceeds to be distributed as provided for by the bankruptcy code.<sup>1</sup> *See* 11 U.S.C. §§ 506, 507(a), and 704. The trustee resolved issues relating to all liens except for whether McIntyre, Kahn and Kruse Co., LPA (the firm) holds a mortgage on the property. The trustee does not challenge the mortgage, but the debtor and her husband Howard Shanker do.<sup>2</sup>

The parties agree that on April 8, 1994, the Geauga County Recorder's office accepted for filing a mortgage on the property. On the face of the document, the debtor and Howard Shanker purport to grant a mortgage to the firm to secure the payment of legal fees in an amount not to exceed \$350,000.00. Howard Shanker admits that he signed the mortgage. The debtor denies signing it and claims someone forged her signature. The firm denies this allegation. The only issue, therefore, is whether the debtor signed the mortgage. If she did and the mortgage is valid, it is a first lien on the property that will transfer to the sale proceeds.<sup>3</sup> If she did not, the firm

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<sup>1</sup> Generally, when property of the estate is sold, the proceeds are applied first to the costs of sale and to satisfy mortgages, liens, and other interests in the property. The remainder, if any, is distributed to administrative claimants and unsecured creditors. According to the claims register, these claims have been filed: unsecured claims totaling \$463,900.10 and secured claims totaling \$765,882.69.

<sup>2</sup> Howard Shanker claims a dower interest in the property.

<sup>3</sup> If the claim is determined to be secured and there is a challenge to the amount of the claim as filed, that would be determined in a separate proceeding where the issues are properly framed by the parties.

does not have a secured interest in the property.<sup>4</sup> In either event, no one contests the trustee's right to sell the property. Both sides have supported their factual assertions with affidavits and retained experts on the handwriting issue.

The firm argues that the court should now weigh the evidence and conclude that a reasonable person could only believe that the debtor did sign the mortgage. On summary judgment, however, the court is required to view the evidence in the light most favorable to the non-moving party. In this case, the non-moving parties presented evidence that if believed would show that the debtor did not sign the mortgage. There is, therefore, a genuine issue of material fact that precludes the firm from obtaining summary judgment that its mortgage is a first and best lien on the property.

#### **INSTRUCTIONS TO THE PARTIES FOR THE TRIAL**

Because there is a genuine issue of material fact, the lawsuit will proceed to trial as previously scheduled. Having reviewed the depositions, affidavits, and briefs filed to date, it is apparent that certain basic points need to be made before trial. First, the debtor's behavior at her deposition can only be described as combative, sarcastic, and evasive. This will not be tolerated at trial on the part of any witness. Second, the parties persist in arguing facts and issues that are irrelevant to this adversary proceeding. These facts and issues include these topics:

- \* the last wishes or instructions of anyone who is now deceased as to who would be permitted to attend the decedent's funeral;
- \* record storage charges alleged to be due to Howard Shanker;

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<sup>4</sup> The issue of whether the firm would then have an unsecured claim and in what amount is not raised in this adversary proceeding.

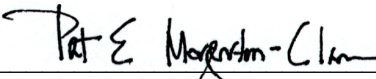
- \* alleged professional conflicts of interest on the part of the firm;
- \* the amount of legal fees paid to the firm and/or still owed;
- \* any issues relating to non-parties, including a trust for the benefit of Howard Shanker's children;
- \* the quality of legal work performed by the firm relating to Cuyahoga County; any alleged violations of Regulation Z;
- \* criminal reports filed by any party against any other party, except insofar as they relate to the claim that the debtor's signature was forged; and
- \* how often the debtor and her husband socialized with members of the firm.

Any one or all of these might be the subject of a legitimate dispute between the parties in another context, but they are not part of this adversary proceeding as the issues have been framed to date. All counsel are directed to tailor their trial presentations to the relevant issues and to instruct their witnesses accordingly. From this point in the case forward, Howard Shanker, who has chosen to represent himself, will be held to the same standard as represented parties.

### CONCLUSION

For the reasons stated, the motion of McIntyre, Kahn and Kruse Co., LPA for summary judgment is denied. A separate order reflecting this decision will be entered.

Date: 8/18/05

  
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 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
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CAROL RAPISARDA, aka	)	Chapter 7
CAROL RAPISARDA SHANKER,	)	
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>ORDER DENYING MOTION FOR</u></b>
	)	<b><u>SUMMARY JUDGMENT AND</u></b>
CAROL RAPISARDA SHANKER, et al.,	)	<b><u>INSTRUCTING PARTIES RE TRIAL</u></b>
	)	<b><u>CONDUCT</u></b>
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, McIntyre, Kahn and Kruse Co. LPA’s (the firm) motion for summary judgment is denied. (Docket 93).

The final pretrial and trial will go forward as scheduled. The parties are instructed that:

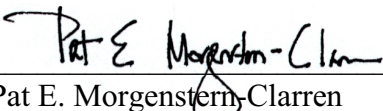
- (1) the court will not tolerate any witness behavior that is combative, sarcastic, or evasive.
- (2) these topics are irrelevant to the legal issues raised in the adversary proceeding:
  - (a) the last wishes or instructions of anyone who is now deceased as to who would be permitted to attend the funeral;
  - (b) record storage charges alleged to be due to Howard Shanker;
  - (c) alleged professional conflicts of interest on the part of the firm;

- (d) the amount of legal fees paid to the firm and/or still owed
- (e) issues relating to non-parties, including a trust for the benefit of Howard Shanker's children;
- (f) the quality of legal work performed by the firm relating to Cuyahoga County;
- (g) any alleged violations of Regulation Z; and
- (h) criminal reports filed by any party against any other party, except insofar as they relate to the claim that the debtor's signature was forged.

(3) All counsel are directed to tailor their trial presentations to the relevant issues and to instruct their witnesses accordingly. At this point in the case, Howard Shanker, who has chosen to represent himself, will be held to the same standard as all other parties.

IT IS SO ORDERED.

Date: 8/18/05

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

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