

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>
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

This dispute arises out of an attorney-client relationship gone sour. For several years, the law firm of McIntyre, Kahn & Kruse Co., LPA represented the debtor Carol Rapisarda Shanker and her husband Howard Shanker in numerous legal matters. In 1994, the McIntyre firm claimed to be owed fees and expenses and refused to continue the representation without security for the debt. The McIntyre firm demanded a mortgage on property Carol Shanker owned at 16903 Chillicothe Road, Chagrin Falls, Ohio. There is such a mortgage on record with the Geauga County recorder's office purporting to bear the signatures of both Shankers.

When Carol Shanker filed her chapter 7 case, the Chillicothe property became property of the chapter 7 estate. The trustee filed this complaint to determine the validity, extent, and

priority of liens on the property and to sell it. The McIntyre firm argues that its mortgage is valid and should be transferred to the sale proceeds, a position with which the trustee agrees. The debtor Carol Shanker takes a contrary position, contending that the mortgage is invalid because her signature is forged. Howard Shanker admits he signed the document, but argues that the firm fraudulently induced him to do so, thus rendering it void as against him as well.

Although there are several issues remaining to be resolved, the major factual issue that needs to be determined to move the case forward is whether the McIntyre firm mortgage is a valid lien on the Chillicothe property. The court, therefore, held an evidentiary hearing on that issue on October 18, 2005 and October 19, 2005. For the reasons stated below, the court finds that Carol Shanker did not meet her burden of proving that she did not sign the mortgage and Howard Shanker did not meet his burden of showing that he was fraudulently induced to sign it.

### **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 (N).

### **PROCEDURAL HISTORY**

The trustee named these parties as defendants in her original complaint: the debtor Carol Rapisarda Shanker, Jewish Community Center, Joan Rapisarda, Michael Skerl, D.D.S., McIntyre, Kahn & Kruse Co., LPA, Novartis Animal Health, Ohio Department of Taxation, OSF Properties, Inc., and Treasurer of Cuyahoga County. The trustee obtained a default judgment against Joan Rapisarda, Michael Skerl, D.D.S., and OSF Properties, dismissed the Cuyahoga

County treasurer, and entered into an agreed order with the remaining defendants except for the debtor providing that the Chillicothe property would be sold with the liens of Geauga County (not named as a party), the McIntyre firm, Jewish Community Center, Novartis Animal Health, and Ohio Department of Taxation being transferred to the sale proceeds. Although the agreed order did not resolve the debtor's status as a defendant, the adversary proceeding was closed.

The adversary proceeding was reopened to resolve the trustee's claims against the debtor and to permit the trustee to file a second amended complaint adding Howard Shanker, the debtor's husband, as a defendant based on his possible dower interest in the property.<sup>1</sup> Mr. Shanker, a law school graduate who is not admitted to the bar, has represented himself throughout these proceedings. He filed a document titled "Answer to Second Amended Complaint and Cross Claim of Howard Shanker and Objection to the Sale of the Real Property and Request to Answer for Minor Children Mike and Halle Shanker and Claim of All Dower Interests in Real Property of Carol Shanker." The court granted the McIntyre firm's motion to dismiss the cross-claim for failure to state a claim and also denied Mr. Shanker's request to represent his children in this case.<sup>2</sup> Carol Shanker answered, admitted the trustee's right to sell the property, and denied the validity of the McIntyre firm's mortgage.<sup>3</sup>

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<sup>1</sup> Docket 29.

<sup>2</sup> Docket 57, 58. Mr. Shanker considered retaining counsel for himself, but decided not to. The court, therefore, gave him notice that he would be held to the same standard at trial as parties represented by counsel. *See* docket 99 at page 5.

<sup>3</sup> Docket 34.

At the end of discovery, the McIntyre firm and Carol Shanker moved separately for summary judgment. The court denied the motions because they failed to show that there was no genuine issue of material fact.<sup>4</sup>

### **ISSUES**

These are the factual issues presented at the evidentiary hearing:

- (1) Did Carol Shanker sign the McIntyre firm's mortgage; and
- (2) Did the McIntyre firm fraudulently induce Howard Shanker to sign the mortgage?<sup>5</sup>

### **THE POSITIONS OF THE PARTIES**

Everyone agrees that the property is an asset of the chapter 7 estate and the trustee has the right to sell it. The dispute is over the status of the McIntyre firm's mortgage lien. The trustee argues that the McIntyre firm has a first mortgage on the Chillicothe property and that she should be permitted to sell the property with that lien (and all others) transferring to the proceeds. Carol Shanker denies that she signed the McIntyre firm's mortgage and seeks to have it declared void as against her. Howard Shanker admits that he signed the mortgage, but claims he was induced to do so by the McIntyre firm's fraudulent representations. The McIntyre firm takes the position that both Carol Shanker and Howard Shanker duly signed the mortgage, making it valid and enforceable.

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<sup>4</sup> Docket 99, 100.

<sup>5</sup> Howard Shanker did not, before trial, state this clearly as a claim or defense. He did, however, state it as his position at trial. *See* FED. R. CIV. P. 15(b), incorporated by FED. R. BANKR. P. 7015.

## LAW

The law regarding mortgages has been in flux in Ohio over the last several years. The law that applies here is the law in effect in 1994 when the McIntyre firm's mortgage was executed. At that time, a mortgage had to meet three major tests to be considered properly executed: (1) the mortgagor had to sign the mortgage; (2) two witnesses had to attest to the mortgagor's signature; and (3) a notary public (or other designated official) had to certify or acknowledge the mortgagor's signature. See OHIO REV. CODE § 5301.01.<sup>6</sup> A facially valid mortgage bears a strong presumption of validity. See *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1025 (6th Cir. 2001) (discussing Ohio law).

Even if a mortgage is defectively executed, it is still generally valid as between the parties to it.<sup>7</sup> *Citizens Nat'l Bank v. Denison*, 133 N.E.2d 329 (Ohio 1956). "The reasoning behind such a rule is to bind the parties to that which they intended." *Seabrooke v. Garcia*, 454 N.E.2d 961, 964 (Ohio Ct. App. 1982). However, where a mortgagor can show that the mortgage is a forgery, or was executed as a result of fraud, the mortgage is ineffective and does not convey an interest in the property. See *Denison*, 133 N.E.2d at 332; *Williamson v. Carskadden*, 36 Ohio St. 664 (Ohio 1881). The party claiming fraud must prove it by clear and convincing evidence. See *In re Zaptocky*, 250 F.3d at 1024-25; *Carskadden*, 36 Ohio St. at 666. In weighing the evidence on

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<sup>6</sup> These requirements were set forth in the former version of § 5301.01 which was in effect in 1994. The current version of § 5301.01, which became effective on February 1, 2002, has different requirements but by its terms "does not effect any accrued substantive rights or vested rights that came into effect prior to February 1, 2002." OHIO REV. CODE § 5301.01(B)(2). The parties have not suggested that the current version of § 5301.01 applies.

<sup>7</sup> In contrast, a mortgage which is not properly executed is subject to a trustee's avoiding powers under bankruptcy code § 544(a)(3). See *Simon v. Chase Manhattan Bank (In re Zaptocky)*, 250 F.3d 1020, 1024 (6th Cir. 2001).

this issue, a notary's certificate of acknowledgment is entitled to great weight as to the facts stated in it. See *Paramount Fin. Co. v. Berk*, 179 N.E.2d 788 (Ohio Ct. App. 1962); *Weaver v. Crommes*, 167 N.E.2d 661, 664 (Ohio Ct. App. 1959). A notary's certificate can, however, be impeached by a mortgagor based on sufficient proof of fraud involving the mortgagee and the notary, or forgery. See *Baldwin v. Snowden*, 11 Ohio St. 203, 212 (Ohio 1860); *Dime Bank v. Rieger*, 1978 WL 218087 (Ohio Ct. App. 1978); *Feagles v. Tanner*, 1900 WL 1123 (Ohio Ct. App. 1900).

The elements of fraud and fraudulent inducement with respect to the granting of a mortgage are: (1) a representation or, where there is a duty to disclose, the concealment of a fact; (2) the representation is material to the transaction; (3) the representation is made falsely with knowledge that it is false, or with disregard and recklessness as to whether it is true; (4) an intent to mislead another into relying on the representation; (5) justifiable reliance; and (6) resulting injury caused by the reliance. See *Cohen v. Lamko, Inc.*, 462 N.E.2d 407, 409 (Ohio 1984); *Medlen v. Alternative Lending Mortgage Corp.*, 1998 WL 546169 (Ohio Ct. App. 1998).

## FACTS

### I.

These findings of fact reflect the court's weighing of the evidence presented at the two day hearing, including determining the credibility of the witnesses. In doing so, the court considered each witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. See FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52. When

the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

*United States v. Trogden (In re Trogden)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)

(discussing the issue in context of Bankruptcy Code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

These individuals testified at the hearing: Carol Shanker, Howard Shanker, Jeannette Kahn, Lee Kahn, Scott Kahn, Robert Kracht, Mary McBride (Geauga County recorder), Philip Bouffard (the McIntyre firm's handwriting expert), and Mary Kelly (Carol Shanker's handwriting expert).<sup>8</sup>

## II.

### The Parties

#### The chapter 7 trustee

Mary Ann Rabin is the chapter 7 trustee.

#### The debtor Carol Rapisarda Shanker

The debtor is intelligent and well-educated, holding an undergraduate degree in biology from John Carroll University and a D.V.M. from The Ohio State University. She has owned and

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<sup>8</sup> After the trial started, Howard Shanker asked to call the trustee as a witness. He did not identify her as a witness before trial and did not provide a satisfactory explanation for why he should be permitted to call her without appropriate notice. The court denied the request.

operated her veterinary practice at the Chillicothe property since about 1985. The property includes four acres of land with a house and a small barn. The house has three floors; the debtor conducts her veterinary business out of the first and second floors.

Over the years, the debtor has also worked on other projects including serving as a pet expert on television (first locally and then nationally for Fox and NBC), developing a product for animal health that was marketed nationwide, and publishing two books.

#### Howard Shanker

Howard Shanker, who is also intelligent and well-educated, holds a J.D. from the University of Kentucky. He has been involved with real estate development in downtown Cleveland, as discussed further below. At all times relevant to this dispute, he has lived at 13610 Sperry Road, Novelty, Ohio 44072.

#### The McIntyre Firm

The McIntyre firm represented Carol Shanker and Howard Shanker in several matters over many years. Robert Kracht, then a member of the firm, and Scott Kahn, now the managing partner, provided most of the representation at issue here.

### **III.**

#### **The McIntyre Firm Mortgage**

On April 8, 1994, the Geauga County recorder received for filing a document titled “Mortgage.” The mortgage is dated April 7, 1994. On its face, Carol Rapisarda Shanker and Howard Shanker grant a mortgage to the McIntyre firm on the Chillicothe property. The document has signatures of both Shankers and of Scott Kahn, on behalf of the McIntyre firm.



The signatures are witnessed by Jeannette Kahn and Lee Kahn and notarized by Jeannette Kahn. The recorder recorded the mortgage in the Geauga County records at volume 977, page 749.<sup>9</sup>

#### IV.

##### **How the McIntyre Firm Mortgage Came to Be Signed**

###### A. The Virgil Brown Building Transaction

In 1988, Howard Shanker operated his business in a building in downtown Cleveland. He proposed to develop that property into a building that would house the Cuyahoga County Department of Human Services and Support Enforcement Agency, described at hearing by Shanker as “the \$26 million Virgil Brown project.” To accomplish this, Howard Shanker had to relocate his business. He decided to do this by purchasing property at 18<sup>th</sup> and Chester Avenue from L&M Properties Company (L&M). Huntington Mortgage Company and L&M provided financing in connection with the transactions.

The testimony about these transactions was sketchy, in part because the witnesses did not consistently differentiate between or among the activities and ownership interests of Howard Shanker, Carol Shanker, a partnership, and a trust called The Michael Shanker Trust. The court has, therefore, relied primarily on the exhibits and secondarily on the testimony. Those documents show that:

1. On August 25, 1988:

Human Services Plaza Partnership, an Ohio general partnership (HSPP), signed a promissory note in favor of The Huntington Mortgage Company for \$825,000.00.<sup>10</sup> The general

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<sup>9</sup> Plaintiff trustee exh. 1.

<sup>10</sup> MKKG exh. G.

partners are listed as Howard Shanker (who signed in this capacity), DIVCO, Inc., and The Michael Shanker Trust. The Michael Shanker Trust signature is provided by Howard Shanker and Carol Shanker, each of whom signed as a co-trustee of the trust. The note states that it is secured by a mortgage.

2. On December 30, 1988:

Howard Shanker and Carol Shanker signed a promissory note in favor of Huntington Mortgage Company for \$600,000.00.<sup>11</sup>

Howard Shanker and Carol Shanker signed a mortgage in favor of The Huntington Mortgage Company to secure the \$600,000.00 note. The mortgage says it is on property listed in exhibit A, but there is no exhibit A to the document entered into evidence.<sup>12</sup>

Howard Shanker and Carol Shanker signed a promissory note in favor of L&M for \$200,000.00.

To secure the L&M note, Howard Shanker and Carol Shanker signed a mortgage deed in favor of L&M on the 18<sup>th</sup> and Chester property.<sup>13</sup>

Carol Shanker was not happy about signing these documents. At the last minute, she had been called into the closing and told that Huntington required her signature or it would not go forward with the transaction. At trial, she claimed that Scott Kahn “forced her” to sign the documents at that time. While she testified that at least ten people could confirm that Kahn

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<sup>11</sup> MKKG exh. D.

<sup>12</sup> MKKG exh. H.

<sup>13</sup> MKKG exh. F.

coerced her into signing, she did not call any as witnesses and the court finds that she did not establish a factual basis for her claim.<sup>14</sup>

B. The Huntington Litigation

In 1990, Howard Shanker and HSPP sued Huntington National Bank and The Huntington Mortgage Company in district court alleging breach of contract arising out of Huntington's commitment to fund the Virgil Brown project. The McIntyre firm represented the plaintiffs on a contingency basis, with the plaintiffs being responsible for expenses. In 1993 or 1994, the plaintiffs won a \$6 million jury verdict against the defendants. The defendants moved for judgment notwithstanding the verdict, which the court granted.

During this time, the \$600,000.00 note owed by Carol and Howard Shanker to Huntington became due by its own terms. Huntington took a judgment against Howard Shanker, only, on the note and started foreclosure proceedings on the 18<sup>th</sup> and Chester property.

C. The L&M Litigation

Howard and Carol Shanker defaulted on the note owed to L&M. In 1993, L&M took a judgment in Cuyahoga County against both Shankers and recorded the judgment lien in Geauga County, where the Chillicothe property is located.<sup>15</sup> Robert Kracht represented the Shankers in the foreclosure litigation that ensued.

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<sup>14</sup> The 1988 transaction is not the subject of this adversary proceeding. The court addresses it here because Carol Shanker might have been arguing that the events were part of a pattern in her business relationship with Scott Kahn to support her version of the events surrounding the signing of the 1994 mortgage.

<sup>15</sup> See Howard Shanker exh. G.

D. The McIntyre Firm's Concern About its Fees

By early April 1994, the McIntyre firm claimed to be owed several hundred thousand dollars in fees for work done for Howard and/or Carol Shanker and/or their business ventures, together with about \$50,000.00 in expenses from the Huntington contingency fee litigation. The firm, having won and lost a large verdict, was willing to pursue the matter on appeal but only if it received security for the fees and expenses. In particular, the McIntyre firm was concerned that Huntington might obtain a judgment against Carol Shanker on the \$600,000.00 note that was in default and obtain a judgment lien on the Chillicothe property. Scott Kahn, therefore, discussed with Howard Shanker the firm's request to obtain a mortgage on the Chillicothe property so that the firm would be ahead of Huntington if it obtained a judgment and started foreclosure proceedings.

Scott Kahn drew up the necessary papers and arranged to meet with the Shankers at Kahn's house the evening of April 7, 1994. They made these arrangements because Carol Shanker's office was on the far east side of town and it was more convenient for her to meet at Scott Kahn's house than to come downtown where both Kahn and her husband maintained offices. All parties were comfortable meeting at the house because they considered themselves to be friends, having done business together and socialized over the years.

The Shankers arrived at the Kahn house that evening. This is where the parties' versions of the facts become irreconcilable. In sum, the McIntyre firm evidence is that both the Shankers signed the mortgage in front of witnesses and a notary. The next day, Scott Kahn made a copy of the mortgage and gave the original to Howard Shanker to file with the Geauga County recorder. Howard Shanker did so and returned a file stamped copy to the McIntyre firm. It was only years

later that either Shanker denied being bound by the mortgage. And the Shanker version, in sum, is this: Howard Shanker signed the mortgage that night but not in the presence of witnesses or a notary. He only signed because Scott Kahn fraudulently induced him to do so by saying the mortgage would be a liability shield and would be a second mortgage behind the L&M mortgage. Carol Shanker, on the other hand, refused to sign and stormed out of the house. Scott Kahn forged her signature before he recorded it with the Geauga County recorder. Howard Shanker never saw the original mortgage again.

After considering all of the evidence, the court finds that the events that took place are essentially as presented by the trustee and the McIntyre firm, as follows: Carol and Howard Shanker came to Scott Kahn's house and Kahn presented them with several documents relating to protecting the firm's fees.<sup>16</sup> He divided them into two stacks: (1) documents that did not need to be witnessed and notarized; and (2) the mortgage on the Chillicothe property, which did. Once again, Carol was not happy about the situation, but she signed the first group of papers, as did Howard. Those papers included a document titled "Personal Guarantee" in which Carol Shanker guaranteed payment to the McIntyre firm of all monies due or to become due to the firm from Howard Shanker, Shanker International, and HSSP.<sup>17</sup>

As the first documents were being addressed, Scott Kahn called his parents Lee and Jeannette Kahn to come over and witness and notarize the mortgage. They gathered in the

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<sup>16</sup> Both Shankers assert that the McIntyre firm did not act ethically during this transaction. They did not, however, identify any specific act that violated any particular disciplinary rule or cite any law on what impact, if any, such an alleged violation would have on the validity of the mortgage. It is their obligation to show a violation of the law and they did not do so.

<sup>17</sup> Trustee plaintiff exh. 2.

kitchen, where Lee and Jeannette witnessed Carol Shanker and Howard Shanker sign the mortgage and Jeannette Kahn notarized the document. The senior Kahns left and shortly after that the Shankers did as well.

Scott Kahn took the mortgage back to his office the next day, April 8, 1994, and made copies. Howard Shanker, who frequently came to the McIntyre firm's office, stopped by to pick up the original mortgage and a check for the filing fee so that he could record the mortgage. Howard Shanker agreed to do this because he lives close to the Geauga County recorder's office. Kahn also gave Shanker an extra copy of the mortgage, asking that he have it stamped and return it to the firm.

Later that same day, Howard Shanker went to the Geauga County recorder's office and presented the original mortgage to a clerk. The clerk examined the original, found the witness signatures illegible, and asked Shanker to print the witness names on the document for clarification, the standard practice in that situation. Howard Shanker did so, although he misspelled Jeannette Kahn's name as "Jeannett" and wrote "Ted Kahn" instead of Lee Kahn. The clerk kept the original mortgage so that it could be recorded and placed on microfiche, a process that can take several days. After that, the standard practice is to mail the original in the addressed envelope provided by the filer. In this case, Howard Shanker gave the clerk an envelope with his address on it, noted by the clerk on the mortgage by the phrase "AE [addressed envelope to] Howard Shanker."

During that same visit, Howard Shanker gave the clerk the copy of the mortgage provided to him by Scott Kahn; the clerk stamped it with the recorder's name, noted the date and time of receipt as "April 8, 1994 3:58 p.m.," and returned it to Shanker. The next day, Howard Shanker

stopped by the McIntyre firm and dropped off the stamped copy of the mortgage which the firm then put with its client records.<sup>18</sup>

On April 12, 1994, the recorder's office mailed the original mortgage back to Howard Shanker at 13610 Sperry Road, Novelty, Ohio.<sup>19</sup>

In arriving at these findings, the court has considered all of the evidence, including these points:

Carol Shanker testified that she would never have signed the mortgage because she always kept her business dealings separate from her husband's. She had, however, in 1988 participated in his business dealings relating to the Virgil Brown building not just in her role as a trustee of the Michael Shanker Trust, but individually. She also testified in deposition that she did not recall if she was at Scott Kahn's house the night of April 7, 1994.<sup>20</sup> At trial, she changed her story to be that she was definitely there, but she didn't sign any documents. She did not explain adequately why she couldn't recall such a significant event on June 1, 2005 at deposition and yet she clearly recalled it at the October 2005 trial. Her explanation for the discrepancy was that she did not feel well at the time of the deposition, but there is nothing in the lengthy deposition transcript to support this. The court finds that this inconsistency regarding the critical event in this case casts considerable doubt on Carol Shanker's credibility. Additionally, Carol Shanker testified that she would not have signed the mortgage because she had already paid \$100,000.00 for an assignment of the L&M mortgage and judgment to prevent a foreclosure on

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<sup>18</sup> MKKG exh. A.

<sup>19</sup> Trustee plaintiff exh. 4.

<sup>20</sup> MKKG exh. R at 57.

the Chillicothe property. That assignment did not, however, take place until March 10, 1995, almost a year later, and so could not have been a legitimate reason why Carol Shanker would not have signed the mortgage on April 7, 1994.<sup>21</sup> When faced with this inconsistency on cross-examination, Carol Shanker did not have much of a response. An additional example of testimony that leads the court to question Carol Shanker's credibility relates to the Personal Guarantee signed by Carol Shanker in which she guaranteed all sums owed to the firm by Howard Shanker, Shanker International, and HSPP. On direct examination, she looked at a copy of the document and testified that her signature appears on it but she did not sign it. From this, she concluded that either Scott Kahn or Robert Kracht must have forged her signature by cutting her signature from a genuine document they had in their office, pasting it on to the guarantee, and then photocopying the cut-and-paste version. On cross-examination, the firm continued her examination by producing the original guarantee. The original shows unequivocally that the signature was placed directly on the document and was in no way cut or pasted from another document.<sup>22</sup> Carol Shanker had no satisfactory response to this evidence. These points all lead the court to conclude that Carol Shanker did not prove that she did not sign the mortgage.

The conclusion that Carol Shanker failed in her burden of proof is also supported by the expert testimony. Both sides presented expert witnesses. While both individuals are deserving

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<sup>21</sup> To resolve the ongoing dispute with L&M, L&M assigned all of its right, title, and interest in and to the 1988 note and mortgage, together with the resulting 1993 judgment and judgment lien, to Joan Osborne Rapisarda (Carol Shanker's mother) and Michael Osborne Shanker Trust, in exchange for payment that apparently came from the trust and/or Joan Rapisarda. The Assignment of Mortgage, Note, Judgment, and Judgment Lien is dated March 10, 1995. Shanker exh. G.

<sup>22</sup> MKKG exh. XX.



of respect, the testimony of Philip Bouffard that Carol Shanker did sign the document was far more convincing than that of Mary Kelly. Dr. Bouffard has had a long and distinguished career as a forensic document examiner. He analyzed Carol Shanker's signature from a number of signatures over the years and concluded that she has a wide range of natural signatures. From those signatures, he identified significant similarities between the known signatures (including several that Carol Shanker acknowledged at one time or another as genuine) and the signature on the mortgage. He found some of the similarities to be so unusual that they would not occur randomly. Dr. Bouffard concluded to a reasonable degree of certainty that Carol Shanker signed the challenged mortgage. The court gives little or no weight to Ms. Kelly's testimony because she relied primarily on dictated signatures produced for purposes of this trial (as opposed to existing signatures from papers signed when the genuineness of the signature was not at issue), she asked Carol Shanker's lawyer for contemporaneous, non-dictated exemplars that included the word "Shanker" but did not receive any, and she could only give a qualified opinion that there were "some indications" that the mortgage may not have been signed by Carol Shanker.

Similarly, the court finds that Howard Shanker's testimony both on his own behalf and in support of his wife's position lacked credibility. Throughout the litigation, the Shankers have claimed that Scott Kahn filed the mortgage with the recorder's office and had the original, alleging that Kahn refused to produce it in discovery because the original would prove that Carol Shanker's signature was forged. All of the trial documents show that Howard Shanker presented the mortgage to the Geauga County recorder's office for filing and had the original mailed back to his house. There is no other reasonable explanation for the notation "AE Howard Shanker" or the notation in the Geauga County Daily Register of Mortgages to be Recorded noting the actual

date the mortgage was mailed back to Shanker's Sperry Road address.<sup>23</sup> The added printing of the witness names also supports this conclusion. The individual who printed the witness names misspelled Jeannette Kahn's first name and mistakenly listed Lee Kahn as Ted Kahn. It is far more likely that Howard Shanker would have made these mistakes than Scott Kahn, who presumably knows his parents' names. The testimony of the recorder, a disinterested third-party, also unequivocally supports the conclusion that Howard Shanker filed the mortgage. Howard Shanker also changed his testimony at trial about whether Scott Kahn's parents were at the house on April 7, 1994, first saying that he did not see them there and later saying that they may have been there. The court finds that Howard Shanker's testimony that Carol Shanker did not sign the mortgage and that he did not file it lacks credibility because it is contradicted by the documents and the greater weight of the evidence.

On the other hand, there are some considerations that do not support the McIntyre firm's version. For example, Jeannette and Lee Kahn are the parents of Scott Kahn and it is possible that the relationship would bias them in favor of their son when they testified that they witnessed Carol and Howard Shanker sign the mortgage. However, the Kahns' testimony was entirely credible; no one questioned the genuineness of their signatures on the mortgage; and if the Kahns did not sign the document at that kitchen meeting, there was no alternative evidence as to when they did so between that night and the next day's recording. The court also considered that Jeannette Kahn recognized Howard Shanker at trial, but did not conclusively recognize Carol Shanker. Carol Shanker acknowledged that her appearance is different now than it was in 1994 (due to different hair color, hair length, and cosmetic surgery) and so this lack of recognition is

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<sup>23</sup> Trustee plaintiff exh. 4.

not surprising. Moreover, by the time of trial all witnesses agreed that Carol Shanker was at the house that night, so the identification issue is insignificant.

Howard Shanker also failed to prove that the McIntyre firm fraudulently induced him to sign the mortgage. He alleges that he would not have signed the mortgage but for Scott Kahn's statements that the mortgage would be a "liability shield" and would be a second mortgage behind the L&M mortgage. The court finds, based on the credibility of the witnesses, that the conversation was otherwise. Scott Kahn told Howard Shanker that his firm wanted the mortgage so that Huntington would not stand ahead of the firm if it got a judgment against Carol Shanker on the \$600,000.00 note and placed a judgment lien on the Chillicothe property. Kahn also assured Shanker that the firm would not initiate foreclosure proceedings based on the mortgage, but wanted to be protected if another lien holder did so. There was no evidence that these statements were not true when made and history proved that the firm did not, in fact, initiate foreclosure proceedings. Moreover, even if Scott Kahn told Howard Shanker that the McIntyre mortgage would be second behind the L&M mortgage, that statement was true when it was made. Howard Shanker did not, therefore, prove that he was fraudulently induced to sign the mortgage.

#### **OTHER MATTERS**

Carol Shanker argued alternatively that the court should *sua sponte* use the trustee's strong arm powers under 11 U.S.C. § 544 to avoid the McIntyre firm mortgage for the benefit of unsecured creditors. She did not present a legal or factual basis for this request and it is denied.

Both Shankers appear to argue that the mortgage is invalid because on the first page it states that the mortgage is executed by "CAROL RAPISARDA SHANKER, individually and

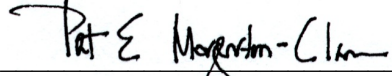
Valley Veterinary Center, Inc., P.A.” and yet at the end, the mortgage is signed not by Valley Veterinary, but by Howard Shanker (as well as Carol Shanker). It is a “well-settled principle . . . that all . . . parts [of a mortgage] are to be construed together, and the meaning ascertained from a consideration of each and every part[.]” *Dodd v. Bartholomew*, 5 N.E. 866, 867 (Ohio 1886). Consequently, an incorrect description of the parties does not invalidate a mortgage “where the error appears upon its face, and the instrument supplies within itself the means of making the correction.” *Id.* In this case, although the mortgage states that it is executed by Carol Shanker and Valley Veterinary, other critical parts of the mortgage such as the signature lines and the notary’s acknowledgment make it clear that the mortgagors are Howard and Carol Shanker. This drafting error does not, therefore, invalidate the mortgage as against either Shanker.<sup>24</sup>

### CONCLUSION

For the reasons stated, the court finds that Carol Shanker did not meet her burden of proving that she did not sign the mortgage and Howard Shanker did not meet his burden of proving that the McIntyre firm fraudulently induced him to sign the mortgage. The trustee is, therefore, authorized to sell the Chillicothe property with all liens transferred to the sale proceeds, including the McIntyre firm mortgage.

A separate order will be entered reflecting this decision.

Date: 2 November 2005

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

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<sup>24</sup> Carol Shanker did not cite any law for why any discrepancy regarding Howard Shanker’s status would affect the mortgage as against her.

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

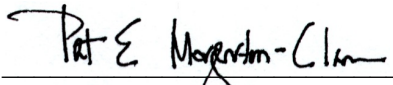


In re:	)	Case No. 02-16621
	)	
CAROL RAPISARDA, aka	)	Chapter 7
CAROL RAPISARDA SHANKER,	)	
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>ORDER</u></b>
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)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

For the reasons stated in the memorandum of opinion filed this same date, the court finds that McIntyre Kahn & Kruse Co., LPA holds a valid mortgage on the property located at 16903 Chillicothe Road, Chagrin Falls, Ohio. The property is property of the chapter 7 estate and the trustee is authorized to sell it in accordance with the provisions of the bankruptcy code with all liens transferred to the sales proceeds, including the McIntyre mortgage.

IT IS SO ORDERED.

Date: 2 November 2005

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

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