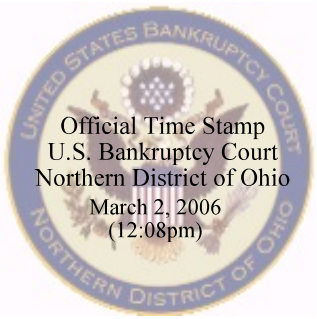
THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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

This adversary proceeding centers on real property located at 16903 Chillicothe Road, Chagrin Falls, Ohio owned solely by the debtor Carol Rapisarda Shanker, D.V.M. The property, which is property of the chapter 7 estate, consists of four acres of land with a house and a small barn. The debtor conducts her veterinary business out of the first and second floors of the house. The chapter 7 trustee filed this adversary proceeding to determine the validity, extent, and priority of liens and to sell the property free and clear of liens, with valid liens transferred to the sales proceeds. Having resolved all issues relating to the validity of liens (and having been authorized to sell the property), the trustee moves to confirm a sale of the property to creditor

McIntyre, Kahn & Kruse Co., LPA.[1] Howard Shanker, the debtor's husband, objects to that motion. For the reasons stated below, the trustee's motion is granted.

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).

THE MCINTYRE FIRM CLAIM

The law firm of McIntyre, Kahn & Kruse, Co., LPA holds a duly recorded mortgage on the Chillicothe property. The mortgage, dated April 7, 1994, was given to it by the debtor and her non-debtor husband, Howard Shanker, to secure payment of legal fees and expenses. The McIntyre firm filed a secured claim in this case for unpaid fees and expenses totaling $765,493.86.[2] While the trustee has not objected to the nature or amount of the claim, the same cannot be said for Howard Shanker, who holds a dower interest in the property. Mr. Shanker challenged the claim on several grounds, the first of which was an allegation that the McIntyre firm forged the debtor's signature on the mortgage and fraudulently induced him to sign it, rendering the mortgage void and leaving the claim, if any, unsecured. The debtor joined him in taking that position. The court bifurcated the proceedings to resolve the fraud issue first.

After a lengthy evidentiary hearing, the court found that the debtor had in fact signed the mortgage and that the McIntyre firm did not fraudulently induce Howard Shanker to sign it. As a

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[1] Docket 142.

[2] On February 23, 2006, the McIntyre firm amended the claim to reduce it to $702,861.34.

result, the mortgage is a valid lien on the property. *See* Memorandum of Opinion and Order dated November 2, 2005.[3] This opinion assumes the reader's familiarity with that first opinion. Howard Shanker appealed from that interlocutory order, but no stay has been issued and so the court has jurisdiction to resolve the remaining issues despite the appeal.

THE TRUSTEE'S MOTION TO CONFIRM SALE TO THE MCINTYRE FIRM

The trustee held an auction sale for the Chillicothe property at which time the McIntyre firm offered to buy the property free and clear of all liens under these terms: a $200,000.00 credit bid[4] together with cash consisting of $15,000.00 plus enough funds to pay certain administrative expenses. Howard Shanker, the only other participant, bid $57,000.00. The trustee found the McIntyre firm's bid to be the highest and best bid.[5]

THE POSITIONS OF THE PARTIES

The trustee and the McIntyre firm contend that the trustee should be permitted to accept the McIntyre firm's offer, including the credit bid, because the firm holds a valid first mortgage on the Chillicothe property that secures at least $200,000.00 in debt. Howard Shanker argues[6] that the trustee should not be permitted to accept the credit bid because: (1) there is no note underlying the mortgage and without a note the mortgage is invalid; (2) alternatively, if the mortgage is valid, it is limited to the amount due on the date it was signed because it does not

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[3] Docket 123, 124.

[4] *See* 11 U.S.C. § 363(k).

[5] Docket 142.

[6] Mr. Shanker is an experienced businessman and law school graduate who has chosen to represent himself, although he has never claimed to be financially unable to afford counsel. The court previously advised him that he would be held to the same standard as represented parties.

comply with the Ohio requirements for an open-end mortgage; (3) the court should use the doctrine of equitable subordination to reinstate a mortgage on the property previously held by a third-party entity called L&M, thus relegating the McIntyre mortgage to a second lien position; (4) the fees charged (which are secured by the mortgage) are not reasonable, in part because all matters were supposed to be on a contingency fee basis; and (5) the McIntyre firm committed malpractice.

In further support of its credit bid, the McIntyre firm argues that its secured claim far exceeds the $200,000.00 credit bid and that Howard Shanker is barred by the statute of limitations and/or estoppel from questioning the amount of the debt. The firm contends alternatively that even if the fees can be questioned at this late date, the undisputed evidence showed that they are due, owing, and reasonable, and should be allowed with interest.

ISSUE

The issue is whether the chapter 7 trustee should be permitted to accept the McIntyre firm's offer to purchase the Chillicothe property as the highest and best bid.

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on February 24, 2006. Howard Shanker presented his case through the cross-examination of McIntyre firm attorneys George Pilat and Scott Kahn, together with exhibits. The McIntyre firm presented its case through the testimony of Scott Kahn and Jonathan Yarger, an attorney who testified as an expert on the reasonableness of the fees, together with exhibits.

These findings of fact reflect the court's weighing of the evidence presented at the 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. Trogdon (*In re Trogdon)*, 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)).

FACTS

The McIntyre firm began to represent Howard Shanker in approximately 1984 and over the next 20 or so years represented him in about 90 different matters. The firm also represented the debtor in about 10 matters. The representation fell into three basic categories: real estate development projects, federal court litigation, and debt defense, including defense of complicated foreclosure actions. With limited exceptions, the firm handled these matters on an hourly fee basis. The firm recorded its time contemporaneously with the activity and generally billed at the end of every month in which it performed services. The billing statements included a breakdown by the activity, the individual who performed the activity, and the amount of time expended. Neither Howard Shanker nor Carol Shanker ever complained about the bills. As is sometimes true with real estate developers, Howard Shanker had times when he had cash and times when he

had a cash flow problem. As a result, he paid the bills sporadically rather than promptly when received.

There were two matters that the McIntyre firm agreed to handle on other than an hourly fee basis: (1) federal court litigation against Huntington Bank, which the firm undertook on a contingency fee basis, with Howard Shanker being responsible for expenses; and (2) a matter involving John Hancock. In the latter case, after Howard Shanker owed about $100,000.00 in fees, the firm agreed to go forward on a contingency fee basis at Shanker's request.

In April 1994, Howard Shanker owed the McIntyre firm $344,914.27 in billed, unpaid fees and expenses and also owed some amount for work that had not yet been billed that month. Scott Kahn sat down with him and went over the outstanding bills, to which Howard Shanker voiced no objection. Howard Shanker and Carol Shanker then signed the document titled "Mortgage" that is dated April 7, 1994 relating to the Chillicothe property and the McIntyre firm recorded it.[7] The mortgage states that it secures "repayment of all sums due and to become due for legal services rendered or to be rendered or for monies advanced or to be advanced by McIntyre, Kahn & Kruse Co., LPA for or on behalf of Carol Rapisarda Shanker and/or Howard Shanker, but in no event to exceed the sum of $350,000.00[.]" At the same time, Carol Shanker signed a document titled Personal Guarantee that guaranteed "all monies due or to become due to McIntyre, Kahn & Kruse [sic] from Howard Shanker, Shanker International, and Human Services Plaza Partnership."

Additional facts are set forth below.

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[7] This is the mortgage that was the subject of the court's first opinion.

DISCUSSION

I. Standing

As a preliminary matter, the court considers whether Howard Shanker has standing to challenge the amount of the McIntyre firm's claim. Under the bankruptcy code, that claim is deemed allowed as filed unless a party in interest objects to it. *See* 11 U.S.C. § 502(a). *See also* FED. R. BANKR. P. 3008 (providing that a party in interest may move for reconsideration of an order allowing or disallowing a claim). The question is whether Howard Shanker is a party in interest for the purpose of challenging the amount of the firm's claim in this proceeding.

The term "party in interest" is a flexible concept and its meaning depends on the context in which it is being applied. "'The phrase is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings'." *Morton v. Morton (In re Morton)*, 298 B.R. 301, 306 (B.A.P. 6th Cir. 2003) (quoting *In re Davis*, 239 B.R. 573, 579 (B.A.P. 10th Cir. 1999)). In various contexts, a party in interest has been found to be a party who has an actual pecuniary interest in the case, a party who has a practical stake in the case's outcome, and a party who will be impacted in any significant way by the outcome of the case. *Id.* at 307 (citing *In re Cowan*, 235 B.R. 912, 915 (Bankr. W.D. Mo. 1999)). Generally, the trustee is the appropriate party to object to a claim in a chapter 7 case. *See In re I & F Corp.*, 219 B.R. 483, 484-85 (Bankr. S.D. Ohio 1998). However, based on Mr. Shanker's dower interest and his expressed intent to purchase the property under the provisions of 11 U.S.C. § 363(i), he has an actual pecuniary interest in this matter and, therefore, has standing to challenge the amount of the claim.

II. Arguments Made by Mr. Shanker

A.

Mr. Shanker first argues that the McIntyre firm's mortgage is invalid because there is no note to support it. A mortgage of real property is security for the debt or for the performance of the obligation which it secures. *Levin v. Carney*, 120 N.E.2d 92, 93 at syllabus 2 (Ohio 1954). A mortgage is usually executed to secure the payment of money and in most cases the debt which is secured is a promissory note. A note is not required, however, and a mortgage can also serve as security for a debt which is an open account. *See Kerr v. Lydecker*, 37 N.E. 267, 270 (Ohio 1894) and *Barnets, Inc. v. Johnson*, 2005 WL 406205 at *3 (Ohio Ct. App. 2005) (acknowledging that a mortgage may be executed to secure the payment of an account). This argument is unavailing.

B.

Howard Shanker makes this second argument for why the mortgage is invalid: On April 7 or 8, 1994, Howard Shanker signed a Security Agreement that granted the McIntyre firm a security interest in a Rolls Royce and a Wellcraft Mercruiser.[8] The agreement includes this provision: "Prior Agreements Superseded: This Agreement constitutes the sole and only agreement of the parties hereto and supercedes any prior understandings or written or oral agreements between the parties respecting the within subject matter." Howard Shanker argues that this supersedes the mortgage and renders it invalid. There was no testimony to support this and the plain language of the contract is otherwise. Specifically, it says that it supersedes any prior agreements on the same subject matter and there are no other agreements in evidence

[8] Shanker exh. M.

dealing with the Rolls Royce or the boat. The document does not, therefore, make the mortgage invalid.

C.

Howard Shanker next contends that, even if the mortgage is valid, it does not secure any debt. This, he argues, is because he does not owe any money to the McIntyre firm on his account. He arrives at this conclusion by saying that all matters were to be handled on a contingency fee basis. He seems to be arguing that because the McIntyre firm accepted payments from him sporadically rather than requiring him to pay monthly, that they agreed he would only have to pay the bills if he had the money, thus making a kind of contingency agreement out of the relationship. The court finds that there is no credible evidence to support this position and all of the evidence showed that only two matters–the Huntington Bank litigation and the John Hancock matter–were to be handled on a contingency basis. The evidence shows that Howard Shanker does owe money on his account and the mortgage does secure that debt.

D.

If the mortgage is valid, Mr. Shanker contends that it secures no more than the $350,000.00 in debt due on the date it was signed. He argues that the mortgage cannot secure amounts that became due after that date because it does not meet the requirements set out in Ohio revised code § 5301.232. That statute says:

> (A) Whether or not it secures any other debt or obligation, a mortgage may secure unpaid balances of loan advances made after the mortgage is delivered to the recorder for record, to the extent that the total unpaid loan indebtedness, exclusive of interest thereon, does not exceed the maximum amount of loan indebtedness which the mortgage states may be outstanding at any time. With respect to such unpaid balances, division (B) of this

> section is applicable if the mortgage states, in substance or effect, that the parties thereto intend that the mortgage shall secure the same, the maximum amount of unpaid loan indebtedness, exclusive of interest thereon, which may be outstanding at any time, and contains at the beginning thereof the words "OPEN-END MORTGAGE."

OHIO. REV. CODE § 5301.232(A) (emphasis added). Subdivision (B) goes on to provide, among other things, that a mortgage that complies with subdivision (A) may secure future advances. OHIO REV. CODE § 5301.232(B). The McIntyre firm argues that the mortgage is an open-end mortgage that secures amounts that became due after the date on which it was signed, as well as amounts due on that date.

The mortgage given by the Shankers does not have the words "open-end mortgage" at the beginning. The McIntyre firm suggested in testimony[9] that the mortgage comes within the spirit of the statute because the language in the body of the document makes it clear that it is intended to secure future debt. The firm has not provided any case support for this interpretation of the statute and it is contrary to the plain language of the statute. Because the mortgage does not include the mandatory language, it secures only that debt that existed as of the day on which the Shankers gave the mortgage. This does not, however, change the result because on April 7, 1994, Howard Shanker, Carol Shanker, and related entities owed the McIntyre firm at least $344,914.27, those fees have not been paid, and the mortgage secures that amount. *See* McIntyre firm Exh. XX. The McIntyre firm made a credit bid of only $200,000.00, which is less than the secured debt on April 7, 1994. The characterization of the document as other than an open-end mortgage does not, therefore, make a difference.

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[9] Cross-examination of Scott Kahn.

E.

Howard Shanker also argues that the court should reinstate a mortgage held at one time by third-party L&M and then equitably subordinate the McIntyre firm mortgage to the L&M mortgage. Mr. Shanker has not provided any facts or law to show that he has standing to raise the rights of L&M. The argument cannot, therefore, be pursued by him. In any event, even if he could go forward on behalf of a third party, he has not presented evidence or law to support the idea that the mortgage could or should be reinstated under the doctrine of equitable subordination.

F.

Finally, Mr. Shanker contends that the McIntyre firm committed malpractice and/or violations of the Ohio disciplinary rules. He did not provide evidence to support this and did not cite any legal authority that any such alleged malpractice or violation would, as a matter of law, reduce the McIntyre firm's secured claim.

CONCLUSION

For the reasons stated, the McIntyre firm's secured claim is at least $200,000.00. As all parties agree that the McIntyre firm may make a credit bid in that amount under bankruptcy code § 363(k), the trustee's motion states good cause and is granted. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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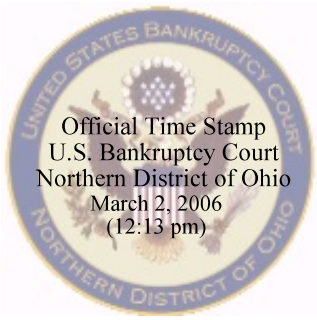

In re:	)	Case No. 02-16621
	)	
CAROL RAPISARDA, aka CAROL RAPISARDA SHANKER,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.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

For the reasons stated in the memorandum of opinion filed this same date and the memorandum filed November 2, 2005, the chapter 7 trustee's motion to sell the real property located at 16903 Chillicothe Road, Chagrin Falls, Ohio to McIntyre, Kahn & Kruse Co., LPA is granted, subject to Howard Shanker's rights under 11 U.S.C. § 363(i). (Docket 142).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge