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.	)	**ORDER**
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, the court finds that the debtor's counsel Carl Gillombardo violated federal rule of bankruptcy procedure 9011 in several respects by filing the motion to reconsider. The court issues a warning to Mr. Gillombardo that his filings on the debtor's behalf should in the future conform with bankruptcy rule 9011.

IT IS SO ORDERED.

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,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

The debtor Carol Rapisarda Shanker, D.V.M. is represented in this case by attorney Carl Gillombardo. The court issued an order *sua sponte* requiring the debtor to show cause why specific points raised in the "Motion to Reconsider Allowed Claim of Defendant MKK" filed on her behalf by Mr. Gillombardo did not violate bankruptcy rule 9011.[1] Attorney Gillombardo filed a timely response.[2] For the reasons stated below, the court finds that Mr. Gillombardo violated bankruptcy rule 9011 by making certain arguments and statements in the motion to reconsider and, in the exercise of the court's discretion, issues a warning to Mr. Gillombardo.

[1] Docket 170.

[2] Docket 176.

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).

BACKGROUND[3]

The chapter 7 case filed by Carol Rapisarda Shanker, D.V.M. has generated considerable protracted and contentious litigation. The dispute involves real estate located at 16903 Chillicothe Road, Chagrin Falls, Ohio owned by the debtor and used by her to conduct her veterinary business. The law firm of McIntyre, Kahn & Kruse Co., L.P.A. holds a recorded mortgage on the property dated April 7, 1994 which was given to the firm by the debtor and her non-debtor husband Howard Shanker to secure payment of accrued legal fees and expenses. The real estate is property of the chapter 7 estate. The trustee filed this adversary proceeding to determine the priority, validity, and extent of liens on the property and to sell it. The debtor and Howard Shanker contested both the nature and amount of the McIntyre firm mortgage and the sale, claiming that the firm forged the debtor's signature and fraudulently induced Howard Shanker to sign.

The court bifurcated the proceedings, first hearing the fraud question. Following a lengthy evidentiary hearing, the court issued a memorandum of opinion and order on November 2, 2005 finding that the debtor and Howard Shanker failed to prove their claims and that the

[3] This narrative is drawn from the court's memoranda of November 2, 2005 and March 2, 2006. Docket 123, 167.

mortgage is a valid lien on the property.[4] The court specifically reserved ruling on the amount of the firm's claim.

The trustee then moved to sell the property to the McIntyre firm which had offered to purchase the property for cash plus a $200,000.00 credit bid based on the mortgage debt. Howard Shanker continued to object to the amount of the McIntyre firm's mortgage and so the court set that issue for an evidentiary hearing on February 24, 2006. The parties were required to file their trial materials by February 17, 2006.

THE DEBTOR'S MOTION TO RECONSIDER THE NOVEMBER 2, 2005 ORDER

On February 18, 2006, the debtor filed a "Motion to Reconsider Allowed Claim of Defendant MKK" in which she asked the court to reconsider the November 2, 2005 order finding the mortgage to be valid and, on reconsideration, to limit the McIntyre firm's secured claim to $50,000.00.[5] The motion was signed by Mr. Gillombardo. The debtor based her motion on an attached document titled "Agreement;" a document which has signature lines for both the McIntyre firm and Carol Shanker, but is only signed by the McIntyre firm. The document says in part:

> The [McIntyre firm] has performed services for both Howard Shanker and Carol Rapisarda Shanker for which there is currently outstanding balances in excess of $350,000.00. To induce [the McIntyre firm] to continue its representation of Howard Shanker, Carol Rapisarda Shanker, Human Services Plaza Partnership, or any related business entity of Howard Shanker's (including Amerian Games, Inc) and Carol Rapisarda Shanker's (including

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[4] Docket 123, 124. The court also found, among other things, that the debtor's argument that the court should *sua sponte* exercise the trustee's strong arm powers under 11 U.S.C. § 544 to avoid the McIntyre firm's mortgage for the benefit of unsecured creditors did not have a basis in law or fact. *See* memorandum of opinion at 19.

[5] Docket 160.

> Valley Veterinary Services, Inc.), Carol Rapisarda Shanker has agreed to guarantee the past and future legal bills and expenses for services performed or to be performed.[6]
>
> Of the existing bills Carol Rapisarda Shanker acknowledges that $50,000.00 of said bills were her joint and several obligation. [The McIntyre firm] agrees to limit Carol Rapisarda Shanker's liability on said existing obligations to $50,000.00, plus any bills to Valley Veterinarian Services, Inc. in the future. This limitation of liability shall survive only on the condition that Carol Rapisarda Shanker does not end up in bankruptcy, voluntarily or involuntarily.

The debtor argued that the McIntyre firm's allowed claim should be reconsidered and limited in amount because: (1) she had just received this document with the McIntyre firm's exhibits for the evidentiary hearing scheduled for (and held on) February 24, 2006; (2) the document was binding on the McIntyre firm; (3) the bankruptcy limitation was void as against public policy and also violated the "spirit" of 11 U.S.C. § 525; and (4) the McIntyre firm "ha[d] perhaps submitted a false claim" because the firm filed a secured claim for $765,493.86, when its claim could not be greater than $50,000.00 under this document. The debtor did not include any discussion of why an unsigned document would be binding on the McIntyre firm.

The McIntyre firm responded that: (1) the document in question was not newly-produced, having been given to the debtor and Howard Shanker before the October 19, 2005 hearing that resulted in the November 2, 2005 memorandum of opinion and order; (2) the debtor did not sign the document (as is evident from the face of the document) and the proposed agreement never went into effect; (3) there is no law supporting the debtor's public policy argument; and (4) even though the debtor and her counsel attended the February 24, 2006 hearing

[6] The court found in the November 2, 2005 memorandum of opinion that Carol Rapisarda Shanker signed the guarantee referred to here, despite her claim that her signature was forged on that document as well as the mortgage.

on the issue of whether the McIntyre firm's secured debt is sufficient to support its $200,000.00 credit bid, the debtor did not participate in that hearing. The McIntyre firm asked for sanctions under federal rule of civil procedure 11.[7]

The court denied the motion to reconsider for the reasons stated in a memorandum of opinion and order,[8] denied the McIntyre firm's sanction request as being procedurally deficient, and *sua sponte* ordered the debtor to show cause why her motion did not violate bankruptcy rule 9011 as being presented for an improper purpose, not warranted by existing law or a nonfrivolous extension or modification of existing law, and/or making allegations that are not supported by the evidence.

DISCUSSION

I.

The purpose of bankruptcy rule 9011 is to deter conduct that is injurious to the judicial system and to compensate parties aggrieved by that conduct. *In re Thompson*, 322 B.R. 769, 773 (Bankr. N.D. Ohio 2004). An inquiry under the rule may be initiated either by a party in interest or the court *sua sponte.* FED. R. BANKR. P. 9011(c)(1). If it appears to a court that a party has violated the rule, the court may:

> . . . enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney . . . or party to show cause why it has not violated subdivision (b) with respect thereto.

FED. R. BANKR. P. 9011(c)(1)(B).

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[7] Docket 166.

[8] Docket 170.

Subdivision (b) states:

> (b) Representations to the Court. By presenting to the court . . . [a] written motion . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The "test for imposing Rule 9011 sanctions is whether the individual's conduct was reasonable under the circumstances." *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 481 (6th Cir. 1996). "The determination of whether an attorney conducted "reasonable inquiry" is judged by objective norms of what reasonable attorneys would have done." *Silverman v. Mut. Trust Life Ins. Co. (In re Big Rapids Mall Assocs.*), 98 F.3d 926, 930 (6th Cir. 1996). Factors to be considered in determining whether an attorney made a reasonable inquiry include "the time available to the signor for investigation; whether the signor had to rely on a client for information as to the facts underlying the . . . motion; whether the . . . motion was based on a plausible view of the law; or whether the signor depended on forwarding counsel or another member of the bar." *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). An attorney's good

faith is not a defense. *Jackson v. O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989).

A legal position is not warranted by existing law if the argument has "no chance of success under existing precedent." *Smith v. Blue Cross & Blue Shield United of Wisconsin*, 959 F.2d 655, 659 (7th Cir. 1992). Similarly, an argument to reverse or extend existing law is frivolous under rule 9011 if it objectively does not hold any chance for success. *In re Dunn*, 320 B.R. 161, 164 (Bankr. S.D. Ohio 2004). If the court finds a violation of rule 9011, it must impose a sanction. *Jackson*, 875 F.2d at 1229. The court has wide discretion in determining the sanction, bearing in mind that it is to be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. BANKR. P. 9011(c)(2). The sanction power is to be exercised "with restraint and discretion." *In re Downs*, 103 F.3d at 477.

II.

In its order to show cause, this court identified seven specific items in the motion to reconsider that appeared to violate subdivisions (b)(1), (2), and/or (3) and gave the debtor time to respond to the order. Each item identified by the court is restated below, with the debtor's position in the motion to reconsider and response to the show cause order following.

The court notes at the outset that Mr. Gillombardo, who has represented the debtor throughout this case, was not under any time pressure to file the motion and that he was not relying on any other member of the bar or on the debtor for information as to the facts.

(1) The debtor's representation that the document titled Agreement was somehow newly discovered, thus warranting a motion to reconsider.

The motion to reconsider states at the outset:

> Counsel for Debtor has just been served with MKK's trial brief and exhibits. Among those exhibits is an Agreement labeled "Def.

> MKKG-AA," a copy of which is attached. This Agreement, signed by Scott H. Kahn on behalf of the law firm provides that the firm will limit Debtor's liability on the April 7, 1994 Mortgage (Exh. Def. MKKG-A) to $50,000.00.

Counsel acknowledged in his response to the show cause order that he had seen the document as part of the McIntyre firm's motion for summary judgment, long before being served with it as part of the firm's trial exhibits. In justification, counsel states that he "did not apprehend its significance regarding allowed secured claims" until he received the trial documents for the second hearing.

The court finds that the clear import of the debtor's representation to the court in the context of this case is that the exhibit was newly discovered, could not have been raised as part of the earlier hearing because of that, and provided a factual basis for reconsideration. There was no evidentiary support for this representation. Even if the misrepresentation was unintentional, the good faith of debtor's counsel would be no defense.

(2) The debtor's legal argument that the document was binding on the McIntyre firm despite the fact that the debtor did not sign it, without legal support.

The motion to reconsider does not state any legal theory for why an unsigned document would be binding on the McIntyre firm. In response to the show cause, Mr. Gillombardo does not claim that the unsigned document is binding based on contract principles. Instead, he states that the argument was supported by the doctrine of judicial estoppel, claiming that the McIntyre firm is:

> . . . clearly judicially estopped from denying the $50,000 . . . limitation. The doctrine of judicial estoppel arguably applies to MKK because, by placing the Exhibit into evidence, MKK is attesting to its probative value and expects that the Court will rely thereupon. See generally, *Eubanks v. CBSK Financial Group, Inc.*,

> 385 F.3d 894 (6th Cir. 2004). If the Exhibit is a nullity, there would be no reason to introduce it into evidence, which MKK did at the evidentiary hearing.[9]

(Emphasis in original).

First, the court notes that counsel did not reference judicial estoppel in the motion to reconsider, which renders questionable the argument that this was the legal basis for the motion. Be that as it may, the doctrine of judicial estoppel is clearly inapplicable to this situation. Under this doctrine, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).[10] Judicial estoppel generally applies when these factors are present:

1. A party's position is clearly inconsistent with its earlier position;

2. The party persuaded a court to accept its earlier position, so that acceptance of the changed position would create the appearance that one court or the other had been misled; and

3. The party trying to assert the inconsistent position would get an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51.

Counsel does not cite or address any of these factors in the response to the show cause order and they do not apply. The McIntyre firm's position has been consistent throughout this

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[9] Docket 176 at 3.

[10] The Sixth Circuit *Eubanks* case cited by the debtor stands for a similar proposition. *See Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004).

litigation: i.e., it holds a valid mortgage on the property in an amount far greater than $50,000.00. The court has not, at the McIntyre firm's request, made any finding to the contrary and there is no issue of unfair advantage. The debtor's claim that the agreement is binding is not supported by existing law because the doctrine of judicial estoppel does not even remotely apply to the facts of this case and the argument did not have a chance of success. Counsel did not make a reasonable inquiry into this issue under the circumstances because if he had, he would have known this.

(3) The debtor's legal argument that the bankruptcy limitation clause is against public policy, for which no law in support was cited; and

(4) The debtor's legal argument that the agreement violates the spirit of 11 U.S.C. § 525, without supporting legal authority that such an argument is legally relevant.

The debtor's motion to reconsider states:

> The attached Agreement contains a provision that the $50,000.00 limitation does not apply if [the debtor] were to "end up in bankruptcy, voluntarily or involuntarily." In other words, outside of bankruptcy, the firm's security would be for only $50,000.00, but inside of bankruptcy, the security would be $350,000.00 or more. Such a provision is void as against public policy. It is also violative of the spirit of 11 U.S.C. § 525 which literally applies to prevent governmental action which discriminates against persons solely by reason of their having filed for bankruptcy. See generally, *FCC v. NextWave Communs. Inc.*, 537 U.S. 293 (2003).

In response to the show cause order, counsel states that "by referring to 11 U.S.C. § 525 as illustrative of a public policy against *ipso facto* clauses such as the one in MKK'a [sic] Exhibit, Debtor was merely highlighting the Congressional expression forbidding governmental action regarding discrimination against bankruptcy debtors, which prohibition should logically be carried over to the private realm."[11]

[11] Docket 176 at 4.

There is nothing logical about this proposition. Bankruptcy code § 525 states that government entities and private employers may not discriminate against debtors in the manner described in the statute. The McIntyre firm is neither a government entity nor a private employer of the debtor. A basic rule of statutory interpretation is that the plain language of the statute controls, except in the rare case where the literal language will produce a result demonstratively at odds with Congress' intent. *See, for example, White v. Kentuckiana Livestock Mkt., Inc.*, 397 F.3d 420, 424 (6th Cir. 2005) (finding in a different context that the literal language of 11 U.S.C. § 525(b) controls). There is nothing in this statute that would support applying it to a private contract regarding attorney fees and nothing that would support the court re-writing the statute to extend it to that circumstance.

Counsel's citation in the response to the show cause to *In re Fretter*, 2000 WL 1780256 (Bankr. N.D. Ohio 2000), does not help the debtor's position. There, a company entered into a written settlement agreement with a creditor to resolve a dispute over an account receivable. Under the agreement, the creditor received an immediate payment in an amount far less than that allegedly due and a contingent right to file a proof of claim for the higher amount claimed if the company filed for protection under the bankruptcy laws. The creditors' committee argued under a different code section, 11 U.S.C. § 502(b)(1), that the creditor's claim should be disallowed because this contingency made the agreement unenforceable. The court rejected the argument and noted that the committee did not cite any law to support its position.

Counsel's statement that the limitation in the Agreement "is void as against public policy" violates rule 9011 because the debtor did not cite any law in support at the time of making the motion and also because the law now cited is clearly inapplicable to the facts of this case. In addition, the statement that the provision violates the "spirit" of § 525 is not warranted

by existing law both because that section does not apply to this case and because counsel did not provide an explanation for why the "spirit" of an inapplicable statute has any legal relevance. Moreover, the statements are not warranted as an argument to reverse or extend existing law because they were not identified as such and they held no chance for success. An attorney making a reasonable inquiry under the circumstances could not have concluded otherwise.

(5) The debtor's statement that the McIntyre firm "has perhaps submitted a false claim."

Counsel justifies this statement by returning to the judicial estoppel argument, saying that "the shortfall between MKK's $765,000.00 secured claim and the $50,000.00 limited amount does therefore appear to involve a false claim because estoppel obviates the need for a fully signed agreement when the 'party to be charged' has published the document in open court."[12]

This argument is totally without merit. To the extent that one can parse the argument, it appears to be this: (1) the McIntyre firm filed a secured claim for $765,000.00; (2) the firm offered the document titled Agreement at the October 2005 hearing; (3) therefore, the McIntyre firm's proof of claim is fraudulent under the doctrine of judicial estoppel. The doctrine of judicial estoppel, as discussed above, does not apply to this case. Additionally, counsel cites no law to show that, even if judicial estoppel applied, it would support a claim of fraud.

Fraud upon the court is defined as conduct: "(1) on the part of an officer of the court; (2) that is directed to the 'judicial machinery' itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; (4) that is a positive averment or is concealment when one is under a duty to disclose; [and] (5) that deceives the court." *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). Counsel did not show that the legal contention that the McIntyre

[12] Docket 176 at 3.

firm committed fraud was warranted by existing law and, moreover, did not have evidentiary support that the McIntyre firm made a statement that was intentionally false, wilfully blind to the truth, or in reckless disregard of the truth. An attorney making a reasonable inquiry before filing the motion would have known this.

(6) The filing of an objection to the claim without standing to do so.

The trustee is the party in interest in this chapter 7 with the responsibility to review and allow or challenge claims. *See* 11 U.S.C. § 704(a)(5). A debtor does not generally have standing to object to claims unless the debtor can show a residual interest in the estate's property. *See In re I&F Corp.*, 219 B.R. 483, 484 (Bankr. S.D. Ohio 1998). The debtor did not address this issue in her motion to reconsider.

In response to the show cause order, the debtor states that she has a "practical stake in this case's outcome and will be impacted in a significant way if she could retain possession of her residence[13] because her husband could more feasibly exercise his right of first refusal to buy in the property if he had to match a lower price."[14] This illustrates a problem that has run throughout this case: the debtor and her husband either deliberately ignore or fail to appreciate that one is a debtor and one is not; each has certain rights under the bankruptcy code, but they are not interchangeable; and one is represented by counsel (the debtor) and one has chosen to represent himself. Nevertheless, the court finds that the debtor's argument on this point is at least tenable and does not violate rule 9011.

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[13] The court notes that the debtor operates her business from the property and has never proven that she resides there.

[14] Docket 176 at 5.

(7) The filing of this motion and then the failure to participate in the hearing that was set for this same issue.

In her motion to reconsider, the debtor states:

> Reference is made to the Court's 08/18/2005 Memorandum of Opinion (Docket 99, FN 3) which provides that "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." The recent evidentiary hearing determined that the claim is secured, and Howard Shanker has objected to the claim as filed. Additionally, Debtor now objects to the amount of the claim as filed. Debtor therefore requests a special hearing either by reason this previous Order or upon Debtor's instant motion to reconsider.

A week after the motion was filed, the court held a hearing to determine the amount of the McIntyre firm's claim, a hearing that was scheduled several weeks in advance on notice to all parties. The debtor and her counsel attended, but did not participate. The show cause required counsel to explain why he filed a motion to reconsider the amount of the McIntyre firm's claim and then failed to participate in the hearing on that issue.

Counsel now responds that "Debtor and her counsel were at the trial table throughout the [February 24, 2006] hearing on confirmation of sale. Neither they nor the Trustee nor MKK addressed the Motion [to reconsider] because no indication was given by the Court that a hearing on the Motion was in order."[15]

This misses the point. The February 24, 2006 hearing was an evidentiary hearing on whether the trustee should be permitted to accept the McIntyre firm's offer, including the $200,000.00 credit bid, as the highest and best offer to purchase the property. Howard Shanker contested the offer on several grounds, including that the McIntyre firm's secured claim was considerably less than the claim as filed. The debtor filed the motion to reconsider attacking the

[15] Docket 176 at 5.

amount of the McIntyre firm claim; she then attended the hearing and could have participated on this issue, but did not. Again, however, the court finds that counsel's position is at least tenable and does not violate rule 9011.

CONCLUSION

For the reasons stated, the debtor's counsel Carl Gillombardo violated federal rule of bankruptcy procedure 9011 in several respects by filing the motion to reconsider. The court assumes that Mr. Gillombardo's filings on the debtor's behalf will in the future conform with bankruptcy rule 9011 and the court concludes the show cause with that warning.

A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge