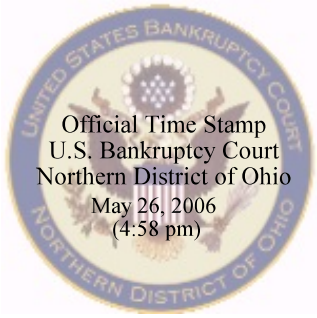
THIS OPINION NOT INTENDED FOR PUBLICATION

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 Howard Shanker violated federal rule of bankruptcy procedure 9011 in several respects by filing his "Objection to Trustee's Motion to Order Turnover of the Property to the Trustee and Motion to Recuse the Trustee and Order a New Trial." The court concludes this show cause (Docket 187) by issuing a warning to Mr. Shanker that his filings in the future must conform to bankruptcy rule 9011 or the court will impose a significant monetary sanction.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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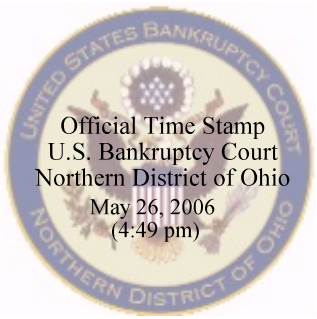

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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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	)	
MARY ANN RABIN, TRUSTEE,	)	Adversary Proceeding No. 03-1301
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
CAROL RAPISARDA SHANKER, et al.,	)	
	)	
Defendants.	)	

Howard Shanker is married to the chapter 7 debtor, Carol Rapisarda Shanker, D.V.M. The court issued an order *sua sponte* requiring Mr. Shanker to show cause why specific conduct in "Howard Shanker's Objection to Trustee's Motion to Order Turnover of the Property to the Trustee and Motion to Recuse the Trustee and Order a New Trial" filed by Mr. Shanker did not violate bankruptcy rule 9011.[1] Mr. Shanker filed a timely response.[2] For the reasons stated below, the court finds that Mr. Shanker violated bankruptcy rule 9011 and, in the exercise of the

[1] Docket 187.

[2] Docket 194.

court's discretion, issues a warning that if he violates the rule again, the court will impose significant monetary sanctions.

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

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

2, 2005 finding that the debtor and Howard Shanker failed to prove their claims and that the 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. After the hearing, the court granted the trustee's motion to sell.[5] When Howard Shanker failed to exercise his dower rights, the trustee completed the sale to the McIntyre firm.[6]

Despite these court orders, the debtor did not turn the Chillicothe property over to the trustee as required by the bankruptcy code. Instead, she forced the trustee to file a "Motion to Order Turnover of the Property from the Debtor to the Trustee." On April 17, 2006, Howard Shanker filed "Howard Shanker's Objection to Trustee's Motion to Order Turnover of the Property to the Trustee and Motion to Recuse the Trustee and Order a New Trial." In his objection, Mr. Shanker argued that: (1) the motion should be denied because the trustee should be removed; and (2) he should be given a new trial on issues previously heard and decided by the court. The trustee and the McIntyre firm responded to the objection.

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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 167, 168.

[6] Docket 179.

After a hearing, the court granted the trustee's motion and overruled the Shanker objection as being totally without merit because Mr. Shanker failed to show that as a non-debtor, non-creditor he had standing to oppose the motion and he further failed to show that it is a defense to a turnover action either to ask for a new trial under these circumstances or to ask that the trustee be removed. He also did not allege any facts that would support an action to remove the trustee. Finally, he failed to cite any legal authority to show that his request for a new trial was timely.

The court then *sua sponte* ordered Mr. Shanker to show cause why his objection violated neither federal rule of bankruptcy procedure 9011(b)(1) nor 9011(b)(2) as being presented for an improper purpose or not warranted by existing law.

HOWARD SHANKER'S OBJECTION TO THE TRUSTEE'S MOTION TO TURN OVER PROPERTY OF THE ESTATE

I.

The purpose of federal rule of bankruptcy procedure 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 . . . [a] party to show cause why it has not violated subdivision (b) with respect thereto. FED. R. BANKR. P. 9011(c)(1)(B). (Emphasis added).

Subdivision (b) states, in pertinent part:

> (b) Representations to the Court. By presenting to the court . . . [a] written motion, or other paper . . . an unrepresented party . . . 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;
>
> (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). 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). If the court finds a violation of rule 9011, it must impose a sanction. *Jackson v. O'Hara*, *Ruberg*, *Osborne and Taylor,* 875 F.2d 1224, 1229 (6th Cir. 1989). 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.

Mr. Shanker's *pro se* status does not make him immune to federal rule of bankruptcy procedure 9011: "Rule 9011 does not exempt *pro se* litigants from its operation; a *pro se* litigant has the same duties under Rule 9011 as an attorney." *McGharen v. First Citizens Bank & Trust Company (In re Weiss)*, 111 F.3d 1159, 1170 (4th Cir. 1997). Federal rule of bankruptcy procedure 9011 is the bankruptcy courts' version of federal rule of civil procedure 11, which applies to federal civil litigation generally. Thus, authoritative statements about obligations of *pro se* litigants under federal rule of civil procedure 11 apply to bankruptcy litigants under federal rule of bankruptcy procedure 9011. The Sixth Circuit has held that *pro se* litigants must comply with federal rule of civil procedure 11 "and make a reasonable inquiry as to whether a complaint is well-grounded in fact and warranted by existing law." *Stevens v. Mooney,* No. 95-1757, 1996 WL 125048, at *1 (6th Cir. March 20, 1996). Moreover:

> while Rule 11 does provide that a person's knowledge, information, and belief are to be based on reasonableness under the circumstances, the rule does not provide a different standard for attorneys and non-attorneys. A court should take into account "the circumstances" surrounding a pro se litigant's pleadings. Nevertheless, the litigant still must meet the general requirements of Rule 11.

Spurlock v. Demby, No. 92-3842, 1995 WL 89003, at *2 (6th Cir. March 2, 1995). This means that an individual "acting *pro se* has no license to harass others, clog the judicial system with meritless litigation, and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358,359 (5th Cir. 1986), quoted with approval by the Sixth Circuit in *McNally v. MacDonald,* No. 90-1423, 1991 WL 73247 (6th Cir. (Mich.) 1991).

II.

In its order to show cause, this court identified five specific items in Mr. Shanker's objection that appeared to violate subdivisions (b)(1) and/or (b)(2) and gave him time to respond to the order. Each item identified by the court is restated below, with Mr. Shanker's position in the objection to the trustee's turnover motion and his response to the show cause order following.

The court notes at the outset that Mr. Shanker, who has represented himself throughout this case, was not under any time pressure to file the objection. He is an intelligent, experienced businessman with both an undergraduate and law degree who has been actively engaged in real estate development in Cleveland for many years.

1. Filing of an objection to the trustee's turnover motion without standing to do so.

The turnover motion was a request by the trustee for the debtor to turnover property of the estate; i.e. the Chillicothe Road property. Mr. Shanker, who is not a debtor or a creditor in this case, opposed the motion without stating why he had standing to do so. In response to the show cause order, Mr. Shanker states that he had a dower interest in the Chillicothe Road property "because the property was not transferred to MKK and Ohio is a record notice State [sic]."[7] This is yet another example of Mr. Shanker's behavior in this case where he simply strings together legal concepts without demonstrating that he has given any thought to whether or how they apply to the facts before the court. This leaves the court yet again to spend time trying to figure out what Mr. Shanker might possibly mean and then providing the analysis that he failed to provide.

[7] Docket 194, ¶ 1, at 4 .

In this instance, the court assumes that Mr. Shanker meant "race-notice state," because Ohio is a race-notice state and there is no such thing as a record notice state. Nonetheless, the fact that Ohio is a race-notice state is irrelevant to the sale of the Chillicothe Road property. In race-notice jurisdictions, if an owner (O) of real property sells it to one (A) who fails to record it, if O then sells this real property to a bona fide purchaser (B) who has no notice of the previous sale from O to A and B "wins the race" against A to record a sale of the real property, B owns the real property.[8] Such a situation would never occur here. The trustee sold the property to the McIntyre firm on March 23, 2006.[9] Because Mr. Shanker had notice of the sale, he could not be a subsequent bona fide purchaser without notice even if that is somehow relevant to the turnover motion, which it is not.

What Mr. Shanker did have is a statutory right to purchase the property based on his dower rights within a stated time frame. That time frame has passed, the McIntyre firm purchased and now owns the property, and Ohio's recording statute is irrelevant. Hence, Mr. Shanker's argument is totally without merit yet again.

2. Raising as a defense to the motion that the court should remove the chapter 7 trustee, without citing legal authority that it is a defense or citing legal grounds to support such a request.

In his response to the show cause order, referring specifically to "CPR 9," Mr. Shanker argues that the trustee violated "the canons of The Supreme Court of Ohio that requires [sic] the disclosure of a prior representation of a party before a trial." Canon 9 does require an attorney to avoid even the appearance of professional impropriety, but Mr. Shanker does not cite any law

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[8] *See* O.R.C. § 5301.25

[9] Docket 179.

that an allegation that a state disciplinary canon has been violated is a defense to a turnover action in a federal bankruptcy court.

Additionally, he fails to show any appearance of impropriety which could adversely impact him, even if this were a relevant consideration. The trustee in this case is adverse to the debtor, Howard Shanker, and the McIntyre firm. There was no evidence that she ever represented any of those entities, much less in a way that would create an appearance of impropriety. The trustee did represent attorney Robert McIntyre and Jane Ann McIntyre, individually, until 1988 on issues unrelated to the issues in this case. Nevertheless, Mr. Shanker states that "the case at bar gives the appearance that the Debtor's house is a pay back to McIntyre for the loss of his house by Rabin's poor representation."[10] This is a complete nonsequitor.

In addition to alleging that the trustee's failure to disclose her prior representation violates Canon 9 of Ohio's Code of Professional Responsibility, Mr. Shanker's response to the show cause order alleges that this failure to disclose violated the "Fifth and Fourteenth Amendments to the U.S. Constitution regarding property rights [sic]." As this is the entirety of his argument, it is deficient on its face and the court will not address it further.

3. Raising as a defense to the motion that the court should order a new trial relating to an order issued six weeks ago, without legal authority that such a request is a defense.

In his response to the order to show cause, Mr. Shanker states that he "had just discovered the cases that he used as Exhibits A, B, C, D, E as they were on microfilm."[11] This is an alleged factual explanation for why Mr. Shanker did not make the request earlier, not legal authority that

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[10] Docket 180 at 2.

[11] Docket 194.

the request is a defense. Mr. Shanker also argues: "This newly discovered conflict evidence was used to protect Howard Shanker's Constitutional rights in [sic] the Fifth and Fourteenth Amendments." However, as stated above, Howard Shanker did not establish that the trustee's nondisclosure of her former representation of Robert McIntyre and Jane Ann McIntyre 18 years ago on an unrelated matter thwarted Mr. Shanker's Fifth Amendment or Fourteenth Amendment rights.

4. Asking for a new trial weeks after the deadline for doing so expired.

In his response to the order to show cause, Mr. Shanker simply states the following single incomplete sentence as an apparent justification for asking for a new trial weeks after the deadline: "Howard Shanker's Constitutional Rights in the Fifth and Fourteenth Amendments to Protect his property rights."[12] This is gibberish and the court will not address it further.

5. Filing opposition to the turnover motion for what appears to be the improper purpose of causing unnecessary delay, and/or needlesly increasing the costs of litigation.

Given the utter lack of legal foundation in Howard Shanker's objection to the trustee's motion to turn over the property, the filing appeared to be a means of delaying the turnover of the property unnecessarily, and/or needlessly increasing the costs of litigation for the McIntyre firm, the trustee, and this court. In his response to the order to show cause, Mr. Shanker first states that he "filed his motion to answer the trustee [sic] motion and she did not answer."[13] However,

[12] Docket 194, ¶ 5 at 4.

[13] Docket 194, ¶ 5 at 5.

the trustee did file a response to his objection to her motion so this is factually inaccurate.[14] Mr. Shanker then twice states that his motion did not delay the turnover of the property.[15] He reports that he moved out of the property by the April 30, 2006 deadline.[16] However, if it was the intention of Howard Shanker to vacate the property by April 30, 2006, thus giving possession of the property to its rightful owner, the McIntyre firm, then it would make no sense to file an objection to the trustee's motion to turn over the property to the McIntyre firm. By doing so, he forced the trustee and the McIntyre firm to spend time and money responding to his baseless objection and took the court's time in having to rule on an objection that never should have been filed. As the Fifth Circuit held, Mr. Shanker's pro se status does not give him a license to harass others, clog the courts, and abuse heavy dockets.

Mr. Shanker's response to the order to show cause reinforces, rather than reduces, the appearance that his objection was filed for the improper purpose of causing unnecessary delay, and/or needlessly increasing the costs of litigation. The response shows a lack of diligence that is well below what this court would expect of any party representing himself. In his response, Mr. Shanker states:

> Howard Shanker is not a lawyer and did receive his J.D. from the University of Kentucky in 1969 . . . Howard Shanker has been held to a different standard that [sic] other Pro Se parties in the Bankruptcy Court for The Northern District of Ohio. Howard

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[14] Docket 181.

[15] Docket 194, ¶ 5 at 5.

[16] Docket 194 at 1.

> Shanker has not seen other Pro Se parties held to the same standard as Represented parties. Howard Shanker does admit that he is not a [sic] expert on the Bankruptcy Rules.[17]

Because Mr. Shanker is not a lawyer, this court does not expect him to display an expert understanding of bankruptcy law. However, this court does expect Mr. Shanker to comply with a basic requirement of federal rule of bankruptcy procedure 9011: one must show diligence in attempting to ground an objection to a motion in fact and law. This court expects no less of other *pro se* litigants who file motions and objections.

CONCLUSION

For the reasons stated, Mr. Shanker violated federal rule of federal rules of bankruptcy procedure 9011(b)(1) and 9011(b)(2) in several respects by filing the objection to the trustee's motion to turn over property of the estate. The court concludes this show cause with a warning. This is not the first time that Mr. Shanker has taken a position in this case that is totally without merit. If in the future the court finds that Mr. Shanker has again violated federal rule of bankruptcy procedure 9011, the court will impose a significant monetary sanction.

A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[17] Docket 194 at 2.