SO ORDERED.

SIGNED this 07 day of July, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
MELISSA DAWN BAIER,	)	**Case No. 03-15687**
	)	**Chapter 7**
Debtor.	)	
	)	
J. MICHAEL MORRIS, Trustee,	)	
	)	
Plaintiff,	)	
v.	)	**Adversary No. 04-5054**
	)	
RITA HERRELL and,	)	
MELISSA DAWN BAIER,	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION AND FOR OTHER RELIEF

On June 2, 2005, this Court entered judgment in favor of the trustee on his complaint to avoid an

unrecorded second mortgage granted by debtor Melissa Dawn Baier to her mother and co-defendant, Rita Herrell, pursuant to 11 U.S.C. § 544(a) and § 551.

Defendants timely filed a Motion to Reconsider and for Other Relief ("Motion"). (Dkt. 47). The defendants continue to challenge the validity of the mortgage, claiming there was no delivery and acceptance of the mortgage. The trustee filed a response. (Dkt. 49). The Motion is set for hearing on July 21, 2005, but the Court has determined that oral argument is unnecessary and would not materially assist the Court. The Court has reviewed the papers and issues this ruling on the Motion.

Standards for Motion for Reconsideration

While the Federal Rules of Civil Procedure do not recognize a pleading known as a "motion for reconsideration," the courts have construed a motion for reconsideration as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e).[1] Motions to alter and amend judgment serve a limited purpose. Such motions are only appropriate when a court has misapprehended the facts, a party's position, or controlling law.[2] It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.[3] Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law; (2) new evidence that was previously unavailable; and (3) the need to correct

---

[1] *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Rule 59 is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 9023.

[2] *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[3] *Id.*; *Van Skiver*, 952 F.2d at 1243 ("[R]evisiting the issues already addressed 'is not the purpose of a motion to reconsider,' and 'advanc[ing] new arguments or supporting facts which were otherwise available for presentation when the original' [trial was held] is likewise inappropriate.")

clear error or prevent manifest injustice.[4]

Defendants' Motion for Reconsideration

In their Motion, Defendants challenge the Court's finding of two of the elements of a valid mortgage: delivery and acceptance. The defendants' arguments are not new, as the trial of this matter focused on these very issues. Defendants complain primarily about the Court's failure to give more credence to defendant Herrell's conduct in the transaction, citing to the fact that Herrell did not request the mortgage, that Herrell did not take any action to cause the mortgage to be recorded, and that Herrell took no steps to obtain the mortgage from her daughter Baier.

Under Kansas law, it is the grantor's intent, not the grantee's, that is of paramount importance in determining whether there has been a delivery of the mortgage. As the Court noted in its Memorandum Opinion in the context of deeds, delivery is a matter of the *grantor's intention* to divest himself of title as evidenced by all the facts and circumstances surrounding the transaction.[5] There was ample evidence of Baier's intent to grant a mortgage to her mother. She signed the mortgage. She knew that, in effect, it replaced the second mortgage that her mother had paid on her behalf. She did not keep the existence of the mortgage secret; Baier told Herrell she had granted a mortgage in her favor. Baier retained the original mortgage and did not destroy it. And perhaps most noteworthy, Baier listed this second mortgage lien and

---

[4] *See Servants*, 204 F.3d at 1012; *Brumark Corp. v. Samson Resources, Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

[5] *Yunghans v. O'Toole*, 224 Kan. 553, 581 P. 2d 393 (1978). Nothing defendants have stated in their Motion persuades the Court that it erroneously relied upon deed cases in applying the delivery and acceptance elements to a mortgage, particularly where the lone Kansas case cited by the Court that involved a mortgage, specified that delivery and acceptance are necessary elements of a mortgage. *See Bailey v. Gilliland*, 2 Kan. App. 558, 44 Pac. 747 (1896).

Herrell on Schedule D of her bankruptcy schedules that she signed under penalty of perjury. All of these circumstances lead the Court to conclude that Baier intended to grant a mortgage on her homestead in favor of her mother and satisfy the delivery element. Defendants' Motion presents nothing to persuade this Court that it has misapprehended the facts or controlling law with respect to the delivery element.

Defendants also attack the Court's determination that Herrell accepted the mortgage. The Court cited *Hansen v. Walker* for the legal proposition that the grantee's acceptance is presumed in the absence of a disclaimer or rejection.[6] Defendants correctly note that in the *Hansen* case**,** the grantor recorded the deed, distinguishing it factually from the case at bar. But *Hansen* does not state that recordation is required to give rise to a presumption of acceptance. Rather, the fact that the deed was recorded went to the element of delivery, not acceptance. This is what the Supreme Court stated in *Hansen:*

> It seems to be a well-settled rule of law in this state that the recording of a deed constitutes delivery to the grantee, and where the deed is intentionally recorded by the grantor, the manual delivery of the deed thereafter is not necessary to make it effectual. In the absence of express disclaimer, acceptance by the grantee is presumed. (*Turner v. Close*, 125 Kan. 485, 264 Pac. 1047; *Fooshee v. Kasenberg*, supra, and cases therein cited.).[7]

Defendants have cited no legal authority that the presumption of acceptance arises only where the deed or

---

[6] Dkt. 40, p. 5, n. 6, citing *Hansen v. Walker*, 175 Kan. 121, 259 P.2d 242 (1953) and *Giefer v. Swenton*, 23 Kan. App. 2d 172, 928 P.2d 906 (1996) (citing *Hansen*).

[7] *Hansen*, 175 Kan. at 124. In *Hansen*, the Supreme Court also found that the grantee accepted the deed by taking possession of the property for several years, paying the taxes and insurance on the property, and making improvements. The court did not have to rely upon the presumption of acceptance. *See also, Giefer v. Swenton*, 23 Kan. App. 2d 172, 928 P.2d 906 (1996), *rev. denied* 261 Kan. 1084 (1997) (The recording of a deed is presumptive evidence of *delivery*, but the presumption can be overcome by other competent evidence.).

mortgage is recorded. It is suggested in an old Kansas case, *Wuester v. Folin*,[8] that acceptance may be presumed in all cases where a delivery of the deed has occurred. In that case, the grantor directed an attorney to prepare a deed in favor of the grantee and executed the deed. The grantor directed the attorney to have the deed recorded. After the deed was recorded, the attorney held the deed in his possession and set out to notify the grantee of the conveyance. Unbeknownst to the grantor, the grantee was living in Ireland at the time the deed was executed. The grantee did not learn of the existence of the deed until after the grantor's death. The Court found under these circumstances that there was a delivery and acceptance of the deed.

> Much stress is placed on the fact that the deed was not placed in the hands of Maggie Folin [grantee] until after the death of Madden [grantor], and also that she had no knowledge of the gift or conveyance during his lifetime. It is argued that the acceptance by the grantee is essential to a complete delivery, that there was no actual acceptance by her, and that unless the conveyance was complete in the lifetime of the grantor no title could pass to her. . . . It is not essential, however, for the grantor to deliver the instrument to the grantee in person. . . . What constitutes a sufficient delivery is largely a matter of intention, and the usual test is, Did the grantor by his acts or words, or both, manifest an intention to make the instrument his deed, and thereby divest himself of title? . . . *Where the grant is clearly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary, and it has been held that this presumption is not overcome by anything short of the actual dissent of the grantee.* (Emphasis added.).[9]

This Court has not found any Kansas case law altering this presumption of acceptance, whether or not the instrument is recorded. Accordingly, the Court concludes that Herrell's acceptance of the mortgage executed by debtor may be presumed. The defendants have pointed to nothing in the record

---

[8] 60 Kan. 334, 56 Pac. 490 (1899).

[9] *Id.* at 337-38.

before the Court indicating Herrell's dissent to the mortgage at the time of its execution and delivery.[10]

For their last point in defendants' Motion, Baier seeks a credit for post-petition payments made to Herrell.[11] The respective positions of the parties upon the trustee's avoidance of a lien was explained in *In re Rubia*.[12] Herrell has an unsecured claim against the debtor's estate for the amount of her debt. The trustee steps into Herrell's shoes and succeeds to Herrell's rights with regard to the *lien*.[13] While debtor's post-petition payments reduce the amount of Herrell's unsecured claim, they do not reduce the amount of the avoided and preserved lien.[14] The effect of giving Baier credit for post-petition payments made to Herrell and a corresponding reduction in the amount of the avoided lien is tantamount to permitting the trustee to recover the post-petition payments from the creditor Herrell – a position that was expressly rejected by the Bankruptcy Appellate Panel in *Rubia*.[15] This Court can not exercise its equitable powers

---

[10] Nor is there any evidence before the Court that Herrell expressed any dissent to the mortgage when her daughter informed her of the mortgage.

[11] Debtor also seeks a determination from the Court as to the amount of payments to the trustee necessary to payoff the lien. There is no evidence in the record at bar upon which the Court would make such a determination. Instead, when and if the trustee enforces the mortgage, the court with jurisdiction of that matter may fix the extent of the lien. Until then, this is a matter for negotiation between the debtor and the trustee.

[12] 257 B.R. 324 (10th Cir. BAP 2001), *aff'd* 23 Fed. Appx. 98 (10th Cir. 2001).

[13] *Id.* at 327-28 (Upon avoidance, the trustee obtains the lien position that the creditor held prior to the lien avoidance; the value of the trustee's lien is limited to the amount of the debtor's debt to the creditor on the petition debt.).

[14] *Id.* at 328, n. 4

[15] *Id.* at 328. ("The Trustee has no right to any payment made to VCCU on the debt, but rather he only has rights in the [collateral] up to the amount of VCCU's debt on the petition date.").

under 11 U.S.C. § 105 in a fashion that conflicts with the Bankruptcy Code.[16] Even though the Bankruptcy Appellate Panel in *Rubia* recognized the potential unfairness of the debtor having to pay the amount of the post-petition payments twice: once to the creditor and once to the Trustee, it did not permit the trustee to recoup the post-petition payments from the creditor nor reduce the avoided lien by the amount of the post-petition payments.[17] In short, the Court agrees with the trustee that the amount of payments that may be required for debtor to keep her home or the manner in which the trustee may realize on the estate's claim (the lien), is a matter that was not before the Court at trial of this matter and is not properly before the Court now.

Defendants' motion for reconsideration and for other relief is DENIED.

IT IS SO ORDERED.

# # #

[16] *See In re Frieouf*, 938 F.2d 1099, 1103 n. 4 (10th Cir. 1991).

[17] *Rubia*, 257 B.R. at 328-29.