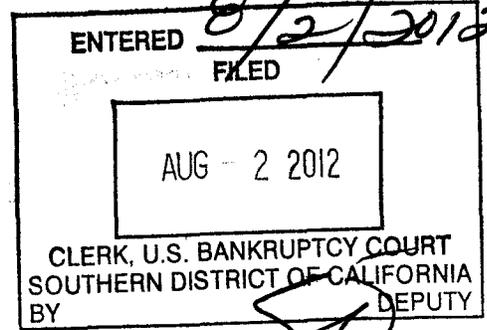


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WRITTEN DECISION - NOT FOR PUBLICATION¹



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	Bankruptcy No.10-00920-LT7
Ryan C. Moeller,)	Adversary No. 10-90219-LT
Debtor.)	
<hr/>		
Jeffrey S. Marshall,)	MEMORANDUM DECISION ON
Plaintiff,)	DEBTOR'S MOTION TO RECOVER
v.)	COSTS AND ATTORNEY'S FEES
Ryan C. Moeller,)	
Defendant.)	

On November 3, 2011, the Court entered its Memorandum Decision in this adversary proceeding concluding that plaintiff Jeffrey Marshall's claims against debtor and defendant Ryan Moeller can be discharged ("Memorandum Decision", Dkt. #69).² On December 5, 2011, Debtor filed a Motion to Recover Costs and Attorney's Fees ("Fees Motion", Dkt. #73). The Court held a hearing on the Fees Motion on January 12, 2012 and issued a

¹ This opinion is intended only to resolve the dispute between these parties.

² The Court's findings set forth in the Memorandum Decision are hereby incorporated herein.

1 scheduling order for further briefing. The parties timely filed their supplemental briefs, and
2 the Court took the matter under submission. Now, after careful consideration of the papers
3 filed in connection with the Fees Motion and in light of the Memorandum Decision, the
4 Court determines that Debtor is not entitled to attorney's fees under any theory appropriately
5 considered by the Court.

7 DISCUSSION

8 Debtor seeks recovery of attorney's fees based on two legal theories. First, he argues
9 that as the prevailing party he is entitled to recover costs and attorney's fees incurred based
10 on an attorney's fees provision contained in two promissory notes ("Notes"). He
11 characterizes the Notes as the "underlying contract" in the nondischargeability action and
12 relies on California Civil Code section 1717. Second, he argues that he is equitably entitled
13 to recover his costs to defend the nondischargeability action. Debtor cites section 105 of the
14 Bankruptcy Code as authority for the Court's exercise of its discretion to award Debtor his
15 attorney's fees as an equitable remedy because, as he argues, Plaintiff's action denied Debtor
16 his fresh start, was substantially meritless, and was no more than an attempt to force Debtor
17 to reaffirm the debt.

19 Standards.

21 No independent right to attorney's fees exists under the Bankruptcy Code, however, a
22 prevailing party may be awarded attorney's fees in a nondischargeability action³ if such fees
23 are recoverable outside of bankruptcy under state or federal law. *Fry v. Dinan (In re*
24 *Dinan)*, 448 B.R. 775, 785 (9th Cir. BAP 2011) ("the determinative question for awarding
25 attorney's fees is whether the creditor would be able to recover the fee outside of bankruptcy
26

27 ³ Debtor concedes the inapplicability of section 523(d) of the Bankruptcy Code here, as that
28 section allows a debtor to recover attorney's fees as the prevailing party only in a section 523(a)(2)
action related to a "consumer debt." The underlying facts here dealt with funds invested by Plaintiff
in a speculative real estate project.

1 under state or federal law."); *see also Kilborn v. Haun (In re Haun)*, 396 B.R. 522, 528
2 (Bankr. D. Idaho 2008) (determining that the critical question more precisely must be:
3 ".....whether the creditor plaintiff would be entitled to fees in state court for establishing
4 those elements of the claim which the bankruptcy court finds support a conclusion of
5 nondischargeability.") Likewise, recovery of attorney's fees by a prevailing defendant-
6 debtor in a section 523(a)(2)(A) action not involving consumer debt is governed by state
7 law. *See Redwood Theaters, Inc. v. Davison (In re Davison)*, 289 B.R. 716, 722-23 (9th Cir.
8 BAP 2003).

9
10 In California, Code of Civil Procedure section 1032 ("CCP § 1032") governs whether
11 a party to litigation is entitled to recover costs. *Santisas v. Goodin*, 17 Cal. 4th 599, 606
12 (1998). In particular, subdivision (b) of CCP § 1032 provides that: "[e]xcept as otherwise
13 expressly provided by statute, a prevailing party is entitled as a matter of right to recover
14 costs in any action or proceeding." Cal. Code Civ. Proc. § 1032(b). Whether such costs
15 include attorney's fees, however, is governed by California Code of Civil Procedure
16 section 1033.5 ("CCP § 1033.5"). Subdivision (a)(10) of CCP § 1033.5 provides that
17 attorney fees are allowable as costs under CCP § 1032 when they are authorized by contract,
18 statute, or law. As a result, under California law, recoverable litigation costs do not include
19 attorney fees, unless the party entitled to costs has a legal basis, independent of the cost
20 statutes and grounded in an agreement, statute, or other law, upon which to claim recovery
21 of attorney fees. *Santisas*, 17 Cal. 4th at 606.

22
23 Debtor's Contract-Based Grounds For Fee Recovery Fail.

24
25 Where a party claims a right to recover attorney's fees based on a contract, the
26 claiming party must first establish the existence of a valid enforceable agreement that
27 contains an attorney's fee provision and then must establish that the provision entitles
28

1 recovery of attorney's fees under the particular circumstances of the litigation. See *Id.* at
2 607.

3
4 Debtor seeks recovery based on a contract provision contained in the Notes. Neither
5 party disputed the validity or enforceability of the Notes. The attorney's fees recovery
6 provision reads identically in each Note and is as follows: "If Lender prevails in a lawsuit to
7 collect on this note, Borrower will pay Lender's costs and lawyer's fees in an amount the
8 court finds to be reasonable." See Tr. Exs. 4 and 7. Debtor cites California Civil Code
9 section 1717 ("CC § 1717") in support of his alleged right, as the prevailing party, to
10 recover his attorney's fees under the attorney's fees provision in the Notes. CC §1717
11 provides, in relevant part, that:

12
13 In any action on a contract, where the contract specifically provides that attorney's
14 fees and costs, which are incurred to enforce that contract, shall be awarded either to
15 one of the parties or to the prevailing party, then the party who is determined to be
16 the party prevailing on the contract, whether he or she is the party specified in the
17 contract or not, shall be entitled to reasonable attorney's fees in addition to other
18 costs.

19
20 Cal. Civ. Code § 1717.

21 The primary purpose of CC § 1717 is to ensure mutuality of remedy for attorney's
22 fees claims under contractual attorney's fees provisions. *Santisas*, 17 Cal. 4th at 611.
23 CC § 1717, thus, applies only to actions that contain at least one contract claim. *Id.* at 615
24 (citation omitted). Where an action asserts both contract and tort or other noncontract
25 claims, CC § 1717 applies only to the attorney's fees incurred in litigating the contract
26 claims. *Id.* (citation omitted).⁴

27 ⁴ Obviously, the parties could contract to allow fee shifting based on tort claims related to the
28 contract. Thus, *Santisas* speaks in terms of the typical contractual attorney's fee claims. Such a
provision is before the Court here. The Notes make no mention of tort claims.

1 Here, Debtor accurately states that he was the prevailing party in the adversary
2 proceeding. Debtor then argues that the adversary proceeding causes of action were
3 "substantially based on the Notes." Alternatively, he argues that the adversary proceeding
4 was a *defacto* action to collect on the Notes. Either conclusion, he argues is supportive of
5 his recovery of attorney's fees. The Court disagrees with both arguments.

6
7 Plaintiff Sought Nondischargeability Based On Fraud, Not Based On Breach Of
8 Contract.

9
10 As set forth in detail in the Memorandum Decision, at trial Plaintiff asserted a claim
11 based on fraud.⁵ Plaintiff sought a nondischargeable judgment pursuant to section
12 523(a)(2)(A) and based on fraudulent inducement. Plaintiff alleged that Debtor
13 intentionally misled him and that, as a result, he sustained damages when he provided
14 Debtor with funds obtained from his home equity line of credit ("HELOC"). Plaintiff never
15 sought recovery under the Notes containing the attorney's fees recovery provisions. In fact,
16 the Notes were not even mentioned in the complaint. Where a complaint does not contain a
17 breach of contract claim, but is based solely on fraud, CC § 1717 is not applicable.
18 *Davison*, 289 B.R. at 724.

19
20 In *Davison*, the debtor prevailed in a non-dischargeability action based solely on
21 fraud and, thereafter, sought recovery of attorney's fees based on CC § 1717 and CCP
22 § 1021 and pursuant to a provision in an agreement between the debtor and the complaining
23 creditor that allowed attorney's fees to the prevailing party in: "any action at law or in
24 equity" if it was "to enforce or to interpret" the terms of the agreement. *Id.* at 725. On
25 appeal, the Panel determined that the bankruptcy court was not "enforcing or interpreting
26 the terms of the Agreement," and therefore, that the debtor was not entitled to attorney's fees

27
28 ⁵ Plaintiff's complaint also sought recovery on other tort theories.

1 under the agreement. *Id.*; see also *Terra Nova Industries, Inc. v. Chen (In re Chen)*,
2 345 B.R. 197 (N.D. Cal. 2006) (debtor was not entitled to attorney's fees under CC § 1717
3 based on a contract provision allowing fees to the prevailing party "to enforce the rights
4 under the agreement", where the court did not interpret or enforce any particular provision
5 of the contract in the underlying tort judgment).
6

7 In his supplemental briefing, Debtor concedes that the Court was not required to
8 interpret the Notes in connection with the Court's determinations that Debtor neither made
9 fraudulent misrepresentations in his solicitation of loans nor omitted information that he had
10 a duty to disclose. Debtor argues, however, that the Court was required to interpret the
11 Notes when the Court determined that Debtor had not misused loan proceeds. The Court
12 disagrees.
13

14 In the Memorandum Decision, the Court very briefly addressed Plaintiff's argument
15 that Debtor misappropriated the investment funds by not using the money solely in
16 connection with the Del Mar Property (as defined therein). This allegation appeared to
17 pertain to Plaintiff's abandoned breach of fiduciary duty claim, rather than the fraudulent
18 inducement claim. Nonetheless, the Court considered the argument and ruled thereon. The
19 Court evaluated the evidence regarding use of funds in connection with its determination of
20 elements of the fraud claim, Debtor's conduct and intent and causation of Plaintiff's alleged
21 injuries. The Court's one-sentence reference to the provision in the Notes tying the maturity
22 of the Notes to the close of escrow, merely provided context, and does not convert the
23 Court's analysis of the fraudulent inducement claim into an analysis of a contract claim.
24 Plaintiff's complaint was based solely on fraud and on abandoned tort claims, and
25 CC § 1717 provides no basis for recovery of fees.
26
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1 Plaintiff Would Not Have Been Entitled To Recover Attorney's Fees If He Had
2 Prevailed On His Complaint.

3
4 An action for fraud seeking damages sounds in tort, and is not a claim on a contract
5 for purposes of an attorney fee award, even though the underlying transaction in which the
6 fraud occurred involved a contract containing an attorney fee clause. *Super 7 Motel*
7 *Assocs. v. Wang*, 16 Cal. App. 4th 541, 549 (1993). Plaintiff here sought recovery of his
8 HELOC borrowings and interest accrued thereon as the damages he suffered from the
9 Debtor's alleged fraudulent inducement. He did not seek to recover the much higher
10 amounts stated to be due under the Notes; the Notes included a 20% return on his
11 investment. If Plaintiff had prevailed on his fraud claim, he would not have been entitled to
12 an award for attorney's fees. Therefore, the reciprocity provision of CC § 1717 is wholly
13 inapplicable.

14
15 Debtor's Request For Attorney's Fees Based On Equity Fails As A Matter Of Law.

16
17 Section 105 authority allows the Court to exercise its discretion to: "issue any order,
18 process, or judgment that is necessary or appropriate to carry out the provisions [of the
19 Bankruptcy Code.]" 11 U.S.C. § 105(a). This Court may not, however: "in the name of its
20 equitable powers, ignore specific statutory mandates." *Hamilton v. Lumsden (In re*
21 *Geothermal Resources International, Inc.)*, 93 F.3d 648, 651 (9th Cir. 1996). Nor may the
22 Court use its authority under section 105(a) to accomplish what the Bankruptcy Code does
23 not otherwise allow.

24
25 In effect, the Debtor asks the Court to punish the Plaintiff. This is not an appropriate
26 basis for fee recovery. There was never a request for a determination that the Plaintiff's
27 adversary proceeding was frivolous. It was not. This Court's sanctioning authority is
28 limited to specific sanctions under the Bankruptcy Code and its inherent contempt powers.

1 Neither provides authority under the circumstances here for the Court's discretionary award
2 of attorney's fees to the Debtor.

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CONCLUSION

The Court denies Debtor's request for attorney's fees. The Plaintiff must submit an order consistent with this determination within 14 days.

DATED: August 2, 2012


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court