

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

January 9, 2014 at 1:30 p.m.

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1. [10-38007-E-7](#) [11-2741](#) GLENDA/JOSHUA GOLDEN
KY-2 MOTION FOR REVIEW OF DEFENDANT
CHUNG ET AL V. GOLDEN ET AL GLENDA GOLDEN'S BILL OF COSTS
ADV. CLOSED 11/22/13 11-26-13 [[87](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants on November 26, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Review of Defendant's Bill of Costs has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Motion for Review of Defendant's Bill of Costs. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Plaintiffs Arnold and Janice Chung ("Plaintiffs") argue that Defendant Glenda Golden is not entitled to attorneys' fees in connection with this adversary proceeding.

On November 4, 2013, the Court issued its judgment in this adversary proceeding, which allowed Plaintiffs and Defendant to file any bills of costs by November 20, 2013. Dckt. 83. On November 20, 2013, Defendant Glenda Golden filed a Bill of Costs requesting \$38,910.00 in attorneys' fees.

Plaintiffs argue that the bill of costs provides no basis for an award of attorneys' fees to Defendant and no such basis exists. Plaintiffs argue that litigants must pay their own fees, that no writing exists giving any contractual right to attorneys' fees and that fees pursuant to 11 U.S.C. § 523(d) are not applicable because Plaintiffs were not seeking determination of "consumer debt."

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Plaintiffs also argue that pursuant to Federal Rule of Bankruptcy Procedure 7054(b), fourteen days notice is required before costs may be taxed by the clerk and Plaintiffs were not served with a copy of the Bill of Costs prior to the filing on November 20, 2013.

DEFENDANT'S OPPOSITION

Defendant responds to the Motion, arguing that Defendant Glenda Golden is the prevailing party in this action and that she is entitled to recover reasonable attorneys' fees. Defendant also argues that the attorneys' fees are reasonable.

PLAINTIFFS' REPLY

Plaintiffs reply to the opposition, sustaining their argument that no notice was given of the bill of costs before approval by the clerk. Plaintiffs maintain that no contract right to attorneys' fees exists and that no reciprocal right to attorneys' fees exists as no contractual right to attorneys' fees ever existed.

DISCUSSION

Pursuant to Federal Rule of Bankruptcy Procedure 7054, the court may allow costs to the prevailing party except when a statute of the United States or other Bankruptcy Code rules otherwise provides and are taxed by the clerk on fourteen (14) day's notice. As Collier on Bankruptcy explains,

28 U.S.C. § 1920 enumerates costs that are taxable by a "judge or clerk of any court of the United States." Although the bankruptcy court is not a "court of the United States" as defined in 28 U.S.C. § 451, bankruptcy judges are, by virtue of 28 U.S.C. § 151, a unit of the district court in each judicial district and by virtue of the reference provided for by 28 U.S.C. § 157(a), act as an adjunct of the district court in bankruptcy cases. Since the district court is a "court of the United States," bankruptcy judges and clerks of the bankruptcy court may tax costs pursuant to 28 U.S.C. § 1920.

10 COLLIER ON BANKRUPTCY ¶ 7054.05 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Section 1920 of title 28 lists six (6) categories of items taxable as costs: (1) fees of the clerk and marshal; (2) fees for court reporter's stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for copies of papers necessarily obtained; (5) docket fees under 28 U.S.C. § 1923; and (6) compensation of court-appointed experts and interpreters. *Id.*

Attorneys' fees are generally not taxable as costs or recoverable as an element of damages. This rule is subject to four (4) general exceptions: (1) a contractual provision for the allowance of reasonable attorney's fees; (2) the power of the court to make awards where equitable, such as attorney's fees awarded out of the fund created as part of a judgment or settlement of a class action; (3) a statute or rule providing for the award of attorney's fees, and (4) as sanctions for aggravated conduct such as

willful disobedience to a court order, bad faith or oppressive behavior. *Id.*; see also *Renfrow v. Draper*, 232 F.3d 688 (9th Cir. 2000).

Here, it does not appear that the fourteen (14) day's notice was provided before costs were taxed by the clerk. The purported allowance of the bill of costs is incorrect, as notice was not proper.

Attorneys' Fees

Even if notice was proper, Counsel for Defendant did not properly seek attorneys' fees.

First, a claim for attorney's fees generally must be made by motion, served no later than 14 days after entry of judgment. 10-54 Moore's Federal Practice - Civil § 54.151 (Matthew Bender 3d ed.).

Second, the complaint does not state a claim for attorneys fees pursuant to Federal Rule of Bankruptcy Procedure 7008(b), which requires that a request for an award of attorney's fees must be pleaded as a claim in a complaint, cross-claim, answer or reply as appropriate. Statements made in a prayer at the end of a complaint are inadequate to satisfy the requirement of Rule 7008(b) that a request for attorney's fees be stated as a claim. See *Garcia v. Odom (In re Odom)*, 113 B.R. 623 (Bankr. C.D. Cal. 1990); *Hartford Police F.C.U. v. DeMaio (In re DeMaio)*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993); *In re AM International, Inc.*, 46 B.R. 566 (Bankr. M.D. Tenn. 1985). Finally, Federal Rule of Bankruptcy Procedure 7010, which incorporates Federal Rule of Civil Procedure 10(b), requires that all claims in pleadings be made in the form of numbered paragraphs.

Here, no motion was made for attorney's fees after the judgment was issued. Furthermore, no counter-claim for attorneys' fees or claim in the answer for attorney's fees. The answer mentions attorney's fees in the prayer for relief: "WHEREFORE, Defendants request that the Court enter judgment in Defendants' favor and against the Plaintiffs for: ...5. Attorney's fees, litigation expenses and cost of defending this suit." Dckt. 7. This barebone statement in the prayer of the answer fails to comply with Federal Rules of Bankruptcy Procedure, 7008, 7010 and 7009 and is insufficient to warrant the award of attorney's fees.

Furthermore, there is no general right to recover attorneys' fees under the Bankruptcy Code. See *In re Kord Enterprises II*, 139 F.3d 684 (9th Cir. 1998) (whether included as part of secured claim); *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997) (prevailing party contractual attorneys' fees in nondischargeability action). Under the American Rule, the prevailing party is not entitled to collect reasonable attorneys' fees unless provided for by statute or contract. *Travelers Casualty & Surety of America v. Pacific Gas and Electric Company*, 549 U.S. 443, 448 (2007). (Enforcing contractual attorneys' fees provision for litigating issues arising under bankruptcy law.) Because state law controls an action on a contract, a party is entitled to attorneys' fees to the extent provided for by the contract. *In re Baroff*, 105 F3d. at 411.

California Civil Code authorizes an award of attorney fees "in any action on a contract" where the contract "specifically provides that attorney's fees and costs, which are incurred to enforce that contract,

shall be awarded" Cal. Civ. Code § 1717(a). An action for negligent misrepresentation or for fraud are not actions to enforce the provisions of a contract. *McKenzie v. Kaiser-Aetna*, 55 Cal. App. 3d 84 (1976); *Stout v. Turney*, 22 Cal. 3d 718 (1978).

Here, Defendant Glenda Golden does not provide the contractual basis for claiming attorneys' fees or a specific provision upon which she bases a right to contractual attorneys' fees in this Adversary Proceeding. Counsel for Defendant argues that a reciprocal right to attorneys' fees exists under Cal. Civ. Code § 1717, but provides no contract or provision to which this right exists. Further, this adversary proceeding does not appear to be one regarding a contract, rather alleged fraud. The court cannot determine the legal basis for attorneys' fees and has not been directed to one.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Review of Defendant's Bill of Costs filed by Plaintiffs having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and "costs" stated by Defendant purported allowance of bill of costs filed on November 20, 2013 (Dckt. 86) are disallowed in their entirety.