

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
2500 Tulare Street, 5<sup>th</sup> Floor  
Courtroom 11, Department A  
Fresno, California

**PRE-HEARING DISPOSITIONS**

**DAY: THURSDAY**  
**DATE: JUNE 15, 2017**  
**CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

**GENERAL DESIGNATIONS**

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

**ORAL ARGUMENT**

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

**COURT'S ERRORS IN FINAL RULINGS**

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [17-10104](#)-A-7 FRED/KARLA OLMSTEAD STATUS CONFERENCE AMENDED  
[17-1035](#) COMPLAINT  
AIR-WAY FARMS, INC. ET AL V. 5-4-17 [[8](#)]  
OLMSTEAD ET AL  
BRIAN CUTTONE/Atty. for pl.

**No tentative ruling.**

2. [16-12615](#)-A-7 WILLIAM/DEBRA NEWMAN STATUS CONFERENCE RE: COMPLAINT  
[17-1041](#) 4-11-17 [[1](#)]  
SALVEN V. UNITED STATES  
DEPARTMENT OF TREASURY,  
RUSSELL REYNOLDS/Atty. for pl.  
RESPONSIVE PLEADING

**Final Ruling**

At the suggestion of the parties, the status conference is continued to July 6, 2017, at 10:00 a.m. Not later than June 29, 2017, the parties will file a joint status report.

3. [16-10046](#)-A-7 KATHY KNOKE MOTION TO PAY  
[16-1048](#) PSB-1 5-3-17 [[48](#)]  
LOANME, INC. V. KNOKE  
PHILIP BIANCO/Atty. for mv.  
CLOSED: 05/01/2017  
RESPONSIVE PLEADING

**Tentative Ruling**

**Motion:** Post-Trial Recovery of Attorney's Fees

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Denied

**Order:** Civil minute order

Defendant Kathy Lyn Knoke prevailed against plaintiff Loanme, Inc. after trial of an adversary proceeding brought under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(6). At trial Knoke did not dispute the existence of the debt to Loanme, Inc. or the amount of the debt. Rather, she successfully argued that the debt did not fall within either exception to discharge. Having prevailed at trial, Knoke now seeks attorney's fees of \$10,687.50. She bases her claim of entitlement to fees on a clause in the note she executed in favor of Loanme and on California Civil Code § 1717.

**DISCUSSION**

Under the American Rule attorney's fees are usually not recoverable from the non-prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Three exceptions exist: (1) where a valid contract provides otherwise, *First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1199 (5th Cir. 1990); (2) where a statute or

rule provides otherwise, *United States v. Standard Oil of California*, 603 F.2d 100, 103 (9th Cir. 1979); or (3) in proper circumstances under the court's inherent equitable powers, i.e., willful disobedience of a court order, prosecution of a case in bad faith, or a party has conferred substantial benefit on a class of individuals, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991).

Here, the promissory note Knoke executed in favor of Loanme Inc., contains an attorney's fees clause: "In the event that we are required to employ an attorney at law to collect any amounts due under this Note, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder." Exh. D, p. 3 of 4.

As drafted, the attorney's fees clause operates only in favor of Loanme, Inc. But in some instances that provision is made reciprocal by operation of law. "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 either to one of the parties or to the prevailing party, then the party who is determined to be the prevailing party on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Cal. Civ. Code § 1717(a).

Before Section 1717(a) applies, three conditions must be satisfied: (1) the action must be "on a contract"; (2) the contract must contain a provision "stating that the attorney's fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party"; and (3) the party seeking fees must be the one who prevailed on the contract. *In re Penrod*, 802 F.3d 1084, 1087-88 (9th Cir. 2015). "Under California law, an action is 'on a contract' when a party seeks to enforce, or avoid enforcement of, the provisions of the contract." *Id.*

The Ninth Circuit Bankruptcy Appellate Panel recently provided guidance on precisely the question before this court. *Savage v. Brill (In re Savage)*, 2015 WL 2452626 (9th Cir. BAP 2015). In *Savage*, the trial court denied attorney's fees to the defendant debtor who prevailed in an adversary proceeding under 11 U.S.C. § 523(a)(2), (6)), citing *Redwood Theaters, Inc. v. Davison (In re Davison)*, 289 B.R. 716 (9th Cir. BAP 2003), and *Santisas v. Goodwin*, 951 P.2d 399 (Cal. 1988). The Bankruptcy Appellate Panel affirmed the denial of attorney's fees finding that neither cause of action was "on a contract" within the meaning of Section 1717(a). In doing so it stated, "The title of the cause of action is of secondary importance to the nature of the parties' assertions in applying CC § 1717(a). Also, "[i]n determining whether an action is 'on the contract' under [CC § ] 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action." Applying these principles, [plaintiff's] factual allegations against debtor under the § 523(a)(2) and (6) claims for relief were based on debtor's own fraud and conduct and did not implicate contract principles. Thus, the bankruptcy court committed no error by applying the holdings of *Davison* and *Santisas* to this case – the creditor's action must have been brought to enforce its rights under the agreement. *Santisas*, 951 P.2d at 409 (tort claims are "outside the ambit of section 1717"); *Davison*, 289 B.R. at 724 (attorneys' fees for tort claims are not recoverable under CC § 1717);

see also *In re Baroff*, 105 F.3d at 443 ("Under California law, a tort action for fraud arising out of a contract is not an action on a contract within the meaning of [CC] § 1717."). Id. at \* 5. (Citations omitted).

Here, the action was styled as exception to discharge proceedings under 11 U.S.C. § 523(a)(2)(A), (6). That Knoke owed Loanme, Inc. monies on the date of her Chapter 7 petition was undisputed. The only issue at trial was whether Knoke's action, particularly intent, fell within the elements of the statutory tort exceptions to discharge. As a result, the court finds that the actions were not on a contract and that Section 1717(a) was not triggered making the attorney's fee clause reciprocal in favor of Knoke. The motion will be denied.

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Defendant Kathy Lynn Knoke's post-trial motion for attorney's fee has been presented to the court. Having considered the motion and opposition, as well as all ancillary documents and the argument of counsel,

IT IS ORDERED that the motion is denied.

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| 4. | <a href="#">15-13655</a> -A-7    LEE BROGGI<br><a href="#">16-1083</a><br>MANFREDO V. THOMAS ET AL<br>DAVID JENKINS/Atty. for pl. | CONTINUED STATUS CONFERENCE RE:<br>AMENDED COMPLAINT<br>12-4-16 [ <a href="#">15</a> ] |
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#### **Final Ruling**

The status conference is continued to September 12, 2017, at 10:00 a.m.

Plaintiff shall (1) cause a re-issued summons and complaint to be re-served on the defendants, and each of them, as soon as practicable; (2) not enlarge the time to file a responsive pleading or motion without court order; (3) take the default of the defendants, and each of them, if a timely responsive pleading or motion is not filed; and (4) file a status report not later than 14 days before the continued status conference.

In the event that any party wishes to advance the date of the status conference, the party may file an ex parte motion to do so and shall serve that ex parte motion on all other parties.

A civil minute order shall issue.

5. [15-13655](#)-A-7     LEE BROGGI     MOTION FOR ORDER PRESCRIBING  
[16-1083](#)     DRJ-2     PROCEDURE TO SUBPOENA CONSUMER  
MANFREDO V. THOMAS ET AL     RECORDS OF DEFENDANTS' LILLIAN  
THOMAS, TODD THOMAS, AND APRIL  
BRUCE  
5-18-17 [[61](#)]

DAVID JENKINS/Atty. for mv.

### **Final Ruling**

**Motion:** Order Prescribing Procedure to Subpoena Consumer Records

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Plaintiff trustee Manfredo seeks an order prescribing procedure for subpoena of consumer records. The motion is granted.

6. [15-11079](#)-A-7     WEST COAST GROWERS, INC.     CONTINUED STATUS CONFERENCE RE:  
[17-1019](#)     A CALIFORNIA CORPORATION     COMPLAINT  
HAWKINS V. GEORGIA-PACIFIC     2-28-17 [[1](#)]  
CORRUGATED LLC  
HAGOP BEDOYAN/Atty. for pl.

**No tentative ruling.**

7. [15-11079](#)-A-7     WEST COAST GROWERS, INC.     CONTINUED STATUS CONFERENCE RE:  
[17-1034](#)     A CALIFORNIA CORPORATION     COMPLAINT  
HAWKINS V. PAUL TOSTE FARMS ET     3-17-17 [[1](#)]  
AL  
LISA HOLDER/Atty. for pl.  
RESPONSIVE PLEADING

**No tentative ruling.**