

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 23, 2022 at 11:00 a.m.

FINAL RULINGS

1.	<u>19-26574-E-7</u> <u>21-2041</u> DNL-4	SEAN ALMEIDA Timothy Walsh	CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM PLAINTIFFS ATTORNEY(S) 1-18-22 [65]
	HOPPER V. NAVY FEDERAL CREDIT UNION ET AL		

Final Ruling: No appearance at the June 23, 2022 Hearing is required.

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Defendant, Navy Federal Credit Union on January 18, 2022. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Prevailing Party Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion for Prevailing Party Fees is continued to 11:00 a.m. on July 28, 2022.

J. Michael Hopper (“Movant”) filed this Motion seeking prevailing party fees in the amount of \$18,013.00 pursuant to Cal. Civ. Code § 1717.

Movant states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the requested relief is based in the Motion:

1. Debtor filed a voluntary Chapter 7 petition on October 22, 2019, and Movant is the appointed trustee for Debtor’s bankruptcy estate. Movant’s discovery requests relating to Navy Federal Credit Union’s (“NFCU”) lien recorded against one of Debtor’s assets make the subject of a dispute between Movant and NFCU. On June 7, 2021, Movant commenced adversary proceeding *Hopper v. Navy Federal Credit Union et al.* to resolve matters in connection with NFCU’s lien. Movant successfully negotiated resolutions of his claims against other defendants in the action, but negotiations with NFCU failed to yield a resolution.
2. On January 3, 2022, the court entered its judgment in favor of the Movant.
3. Cal. Civ. Code § 1717 makes reciprocal an otherwise unilateral contractual obligation to pay attorney’s fees. § 1717 applies when: (a) the action in which the fees are incurred is an action “on a contract”; (b) the contract contains a provision stating that attorney’s fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party; and (c) the party seeking fees must be the party who prevailed on the contract.
4. Movant requests an order awarding him a total compensation of \$18,013.00 as the prevailing party in *Hopper v. Navy Federal Credit Union et al.*, to be paid by defendant NFCU.

BASIS FOR ATTORNEY’S FEES

In the Motion, Movant cites to California Civil Code § 1717, a substantive state law making contractual attorney’s fees provisions reciprocal; which states:

(a) 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 party prevailing 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.

...

(b)

(1) **The court**, upon notice and motion by a party, **shall determine** who is **the party prevailing** on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [dismissals], **the party prevailing** on the contract **shall be the party who recovered a greater**

relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

Movant is the party who recovered the greater relief in *Hopper v. Navy Federal Credit Union et al.*

In the Motion, Movant does not cite the court to any contractual provision to be made reciprocal under California Civil Code § 1717. Rather than providing the contractual attorney's fees provision and evidence thereof, Movant dictates to the court the Movant's factual findings and legal conclusion, stating in the Motion:

Here, community liability was predicated on Spouse's liability to NFCU pursuant to the terms of the Line of Credit. These terms included attorney's fees and costs for contract enforcement as evidenced by NFCU's breakdown of the judgment, which identified \$3696.46 in fees and \$569.90 in costs. In the absence of a statutory entitlement to fees, it may be inferred that the Line of Credit agreement included an attorney's fees provision.

Motion, p. 6:19-23; Dckt. 65. While referencing a Line of Credit Agreement, no attorney's fees provision is stated as being a grounds for the Motion.

No copy of the Line of Credit Agreement is provided by Movant as an exhibit.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or provided by contract, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

Opposition to the Motion has been filed by Navy Federal Credit Union, to which the Movant has filed a Reply.

The first element for § 1717 to apply is that the action in which the fees are incurred must be an action “on a contract.” Under California law, an action is “on a contract” when a party seeks to enforce, or avoid enforcement of, the provisions of the contract. *In re Penrod*, 802 F.3d 1084, 1088 (9th Cir. 2015). Here, Movant states that the only possible source of NFCU’s asserted right to payment was the contract underlying the Visa line of credit (“Line of Credit”) that Ms. Almeida (“Spouse”) maintained through and after her separation from Debtor. Dckt. 65 at 6:8-9. Movant contends that the Court’s analysis of the liability of the community estate for the Line of Credit necessarily had to look beyond NFCU’s abstract based on the judgment NFCU received from its state court action against Spouse. *Id.* at 6:11. Movant concludes that in resolving the question of whether Debtor and his bankruptcy estate were wholly liable for the post-separation debt Spouse accrued, the court decided the action based on the underlying contract between NFCU and Spouse. *Id.* at 6:15-17.

NFCU counters that its action on the contract was a previous action filed in state court against Spouse which resulted in a judgment. Opposition, Dckt. 70 at 2:4-6. NFCU further points out that in the *Hopper v. Navy Federal Credit Union et al* action, this court did not interpret or make any decisions on any provision in the underlying contract. *Id.* at 2:7-8. Civil minutes deciding the issue presented in the adversary proceeding at issue specifically state that the court’s ruling “only determines how the lien has or has not attached to property of the bankruptcy estate.” Civil Minutes, Dckt. 57 at 6. Movant did not provide the court with any law that furnishes them the right to attorney’s fees based on determining whether a judgment lien encumbers community or separate property.

In a Reply, Movant argues the application of California Civil Code § 1717. Dckt. 72. However, Movant offers nothing with respect to what the alleged contractual attorney’s fee provision applies.

The court notes the language used in California Civil Code § 1717 expressly states: “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[.]” Cal. Civ. Code § 1717, subd. (a) (emphasis added). Movant has not provided any documentation of the underlying contract, much less any documentation of the underlying contract’s provision which specifically provides for attorney’s fees and costs to the prevailing party.

The only documentation Movant has provided in support of their Motion is a copy of Movant’s special counsel’s billing records. See Exhibit A, Dckt. 68. For the court to make a judgment on whether to award attorney’s fees and costs pursuant to a contract, Movant must provide proof of such a provision within the underlying contract. Here, Movant has not done so and the court may not render a favorable judgment to Movant without examining proof that the underlying contract specifically provides for prevailing party’s attorney’s fees and costs.

Abstract of Judgment

NFCU cites *Bos v. Bd. of Trs.*, 818 F.3d 486 (9th Cir. 2016) arguing against Movant’s contention that Movant was the prevailing party in an action on Spouse’s underlying credit card contract.

Opposition, Dckt. 70. The adversary proceeding in *Bos* “arose entirely under the federal Bankruptcy Code, and in no way required the bankruptcy court to determine whether or to what extent the Trust Agreements or the Note were enforceable against Bos, or whether Bos had violated their terms.” *Bos*, 818 F.3d at 490.

What we do not know is what the contractual attorney’s fees provision provides, possible “litigation of any issues concerning the amount or right to enforce this obligation in any bankruptcy court proceeding.” The complaint is in the nature of a quiet title action, concerning the enforceability of judgment liens.

While telling the court there is some contractual provision, no evidence of such contractual provision has been provided. Movant has not carried his burden of proof on a key element to the right to recover attorney’s fees - there being a contractual right to attorney’s fees not having been shown.

The court having determined that Movant has not met their burden for prevailing party attorney’s fees, this Motion is denied without prejudice

May 12, 2022 Hearing

At an earlier hearing on May 12, 2022, the court approved the settlement between Plaintiff Trustee and Defendant.

The hearing is continued to allow the Settlement to be consummated and this Motion to be dismissed by Plaintiff-Trustee.

June 23, 2022 Hearing

On June 20, 2022, Plaintiff-Trustee filed a Status Report. Dckt. 79. Plaintiff-Trustee reports that the Settlement, which has been approved by the Court in the Sean Almeida bankruptcy case, is being performed, with the settlement funds having now been disbursed by check by the Plaintiff-Trustee.

Plaintiff-Trustee requests that the hearing be continued to allow for the check to clear, judgment liens released, and this Motion to be dismissed.

The court continues the hearing to July 28, 2022.

The court shall issue an 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 Prevailing Party Attorney’s Fees and Costs filed by Plaintiff-Trustee J. Michael Hopper having been presented to the court, the court having approved a settlement in this Adversary Proceeding, the dismissal of this Motion contingent on performance of the terms and conditions of the Settlement, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Prevailing Party Fees is continued to **11:00 a.m. on July 28, 2022.**