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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	EC-10-1309-DHKi
7	ROBERT J. CAREY,)	Bk. No.	09-31861
8	Debtor.)	Adv. No.	09-02531
9	_____)		
10	CHARLIE Y., INC.,)		
11	Appellant,)		
12	v.)	OPINION	
13	ROBERT J. CAREY,)		
14	Appellee.)		
15	_____)		

Argued and Submitted on February 17, 2011
at Sacramento, California

Filed - March 4, 2011

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Christopher Klein, Bankruptcy Judge, Presiding.

Appearances: Elizabeth Shoemaker argued for Appellant Charlie Y.,
Inc. and Kenrick Young argued for Appellee Robert J.
Carey.

Before: DUNN, HOLLOWELL, and KIRSCHER, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:

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3 Following trial of an adversary proceeding ("Adversary
4 Proceeding"), the bankruptcy court excepted from discharge
5 Charlie Y., Inc.'s ("Appellant") claim against Robert J. Carey
6 ("Debtor") for breach of a guarantee obligation in circumstances
7 in which Appellant alleged that the Debtor had made written
8 misrepresentations regarding his financial condition. After a
9 judgment was entered in Appellant's favor for \$35,000, Appellant
10 moved for an award of attorney's fees in the amount of
11 \$43,155.25. Debtor opposed the motion. After a hearing, the
12 bankruptcy court denied Appellant's motion for attorney's fees
13 based on its conclusion that Appellant's complaint in the
14 Adversary Proceeding did not state a claim for attorney's fees
15 consistent with the requirements of Federal Rule of Bankruptcy
16 Procedure 7008(b).¹ For the reasons set forth below, we VACATE
17 the bankruptcy court's dismissal of Appellant's Fee Motion and
18 REMAND to the bankruptcy court to determine an appropriate award
19 of attorney's fees in Appellant's favor.

20 FACTS²

21 This appeal results from collection efforts concerning
22

23 ¹ Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
26 The Federal Rules of Civil Procedure are referred to as Civil
Rules.

27 ² Only such factual background from the record of the
28 Adversary Proceeding as is relevant to this appeal is included
herein.

1 defaults on a restaurant purchase obligation. In 2003, Appellant
2 sold its restaurant business to SGBD Restaurant I LLC, a Delaware
3 limited liability company ("SGBD"). The unpaid balance of the
4 purchase price was to be paid pursuant to a promissory note
5 ("Promissory Note") in the principal amount of \$90,000, bearing
6 interest at 8% per annum, signed on behalf of SGBD by David A.
7 Zebny ("Zebny") and Virginia Ann George ("George") as its Member
8 Managers. The Promissory Note provided that,

9 If any action be instituted on this Promissory Note,
10 the undersigned agree to pay such sums as the Court may
11 fix as attorney's fees, costs and expenses associated
12 therewith.

13 Payment of the Promissory Note was supported by the personal
14 guarantees ("Guarantee") "jointly and severally, unconditionally
15 and irrevocably" of Zebny and George. The Guarantee provided
16 that,

17 The undersigned jointly and severally agree to pay on
18 demand . . . all expenses of collecting and enforcing
19 this guarantee including, without limitation, expenses
20 and fees of legal counsel, court costs and the cost of
21 appellate proceedings.

22 In February 2005, the Debtor replaced George as a personal
23 guarantor of payment of the Promissory Note. The Debtor's
24 acceptance of guarantee obligations was documented by a First
25 Addendum to Promissory Note and Personal Guaranty (the
26 "Replacement Guarantee"), dated February 18, 2005, and signed by
27 the Debtor "as an Individual and Member of SGBD . . . and
28 Guarantor." Appellant and SGBD agreed in the Replacement
29 Guarantee that the Promissory Note and Guarantee would "remain in
30 full effect" subject to the modifications set forth in the
31 Replacement Guarantee. The Replacement Guarantee further

1 provided that,

2 [The Debtor and Zebny] agree to act as responsible
3 parties for all liability under the [Promissory] Note
4 as members of [SGBD] and under the [Guarantee] as
5 individuals. [The Debtor] has been a member of [SGBD]
6 since its inception.

7 Following a default by SGBD of its payment obligations under
8 the Promissory Note, Appellant began collection efforts against
9 SGBD and Zebny, resulting in collection of part of the balance
10 owed on the Promissory Note. However, by late 2008, Zebny ceased
11 communicating with Appellant, and Appellant received notice that
12 SGBD had filed for bankruptcy protection. At that point,
13 Appellant contacted the Debtor to collect under the Replacement
14 Guarantee, without success. On or about May 6, 2009, Appellant
15 filed a complaint in Marin County, California Superior Court
16 against the Debtor for collection of the outstanding balance
17 under the Promissory Note. The Debtor filed his chapter 7
18 bankruptcy petition on or about June 10, 2009.

19 On or about August 17, 2009, Appellant filed its complaint
20 ("Complaint") to except the Debtor's debt to Appellant under the
21 Replacement Guarantee from discharge pursuant to § 523(a)(2)(B).
22 In the preamble to the Complaint, Appellant stated:

23 Plaintiff requests entry of a non-dischargeable
24 judgment against the Debtor for the full amount of any
25 debt (including, but not limited to principal,
26 interest, costs, and attorney's fees) determined to be
27 owing to Plaintiff by the Debtor and determined to be
28 non-dischargeable pursuant to 11 U.S.C. § 523.
(Emphasis added.)

29 In Paragraph 1 of the Complaint, Appellant alleged that,

30 Plaintiff received a promissory note guaranteed by
31 Defendant, and on May 6, 2009, Plaintiff filed a
32 complaint in Marin County Superior Court to collect
33 from Defendant the amount owed on the promissory note.

1 In Paragraph 7 of the Complaint, Appellant alleged, among other
2 things, that the Debtor signed the Replacement Guarantee. In
3 Paragraph 10 of the Complaint, Appellant alleged that,

4 On or about May 6, 2009, Plaintiff filed a complaint
5 against Defendant in Marin County Superior Court
6 demanding payment of damages in the amount of
\$37,040.45, interest on such damages, and attorney's
fees. (Emphasis added.)

7 In its First Claim for Relief under 11 U.S.C. § 523(a)(2)(B), in
8 Paragraph 19 of the Complaint, Appellant "re-alleges and
9 incorporates by reference the previous allegations of paragraphs
10 1 through 18 above as though fully set forth herein." In its
11 Prayer for Relief, Paragraph B, Appellant requests "judgment for
12 such non-dischargeable debt in the full amount of Plaintiff's
13 damages (including principal, accrued and accruing interest,
14 costs, and attorney's fees) to be proved at trial"

15 (Emphasis added.)

16 In his Answer to the Complaint, the Debtor "prays that
17 Plaintiff's Complaint be dismissed and Defendant be awarded
18 reasonable attorney's fees and for any other relief the court may
19 deem appropriate." (Emphasis added.)

20 The Adversary Proceeding was tried by the bankruptcy court
21 on May 13, 2010. In her opening statement at the trial, counsel
22 for Appellant requested an exception to discharge determination
23 as to Appellant's damages "plus legal costs and attorneys' fees"
24 but otherwise did not present any evidence as to the attorney's
25 fees that Appellant sought to collect from the Debtor at the
26 trial.

27 Following the presentation of evidence, the bankruptcy court
28 made oral findings in favor of Appellant on its § 523(a)(2)(B)

1 claim for relief. An exception to discharge judgment
2 ("Judgment") in favor of Appellant, awarding damages of \$35,000
3 against the Debtor, was entered on May 13, 2010. Neither party
4 appealed the Judgment.

5 On or about May 27, 2010, Appellant filed a Bill of Costs
6 requesting a total costs award of \$1,688.56. The bankruptcy
7 court denied Appellant an award of costs, stating as the reason:

8 The judgment entered in this case on May 13, 2010 does
9 not award costs to the Plaintiff, so your Bill of Costs
will not be entered.

10 Appellant did not appeal the denial of its Bill of Costs.

11 On or about June 10, 2010, Appellant filed a motion ("Fee
12 Motion") for approval of an award of attorney's fees in the
13 Adversary Proceeding, consistent with the terms of the Promissory
14 Note. Appellant supported the Fee Motion with a Declaration of
15 its counsel itemizing her time with respect to the collection
16 efforts against the Debtor under the Replacement Guarantee.
17 Debtor opposed the Fee Motion.

18 Following a hearing, the bankruptcy court dismissed the Fee
19 Motion based on its conclusion that the Complaint did not state a
20 claim for attorney's fees as required by Rule 7008(b). The
21 bankruptcy court entered a minute order ("Minute Order")
22 dismissing the Fee Motion on August 13, 2010.

23 Appellant filed a Notice of Appeal of the Minute Order on
24 August 17, 2010.

25 JURISDICTION

26 The bankruptcy court had jurisdiction under 28 U.S.C.
27 §§ 1334 and 157(b)(2)(B) and (I). We have jurisdiction to
28 determine our jurisdiction. Hupp v. Educational Credit

1 Management Corp. (In re Hupp), 383 B.R. 476, 478 (9th Cir. BAP
2 2008). In this appeal, we conclude that we have jurisdiction
3 under 28 U.S.C. § 158, as discussed below.

4 ISSUES

5 1) Was Appellant's Notice of Appeal filed timely?

6 2) Did the bankruptcy court err in dismissing the Fee
7 Motion based on its conclusion that the Complaint did not state a
8 claim for attorney's fees consistent with the requirements of
9 Rule 7008(b)?

10 STANDARD OF REVIEW

11 Review of the bankruptcy court's decision to dismiss the Fee
12 Motion based on failure to state a claim for attorney's fees in
13 the Complaint is analogous to review of a decision on a motion to
14 dismiss for failure to state a claim upon which relief can be
15 granted under Civil Rule 12(b)(6). The standard for review is de
16 novo. Movsesian v. Victoria Versicherung AG, 629 F.3d 901, 905
17 (9th Cir. 2010). De novo means that we look at the matter anew,
18 the same as if it had not been heard before, and as if no
19 decision previously had been rendered, giving no deference to the
20 bankruptcy court's determinations. McComish v. Bennett, 611 F.3d
21 510, 519 (9th Cir. 2010).

22 DISCUSSION

23 I. Appellant's Notice of Appeal was timely.

24 The Debtor argues that we have no jurisdiction to hear
25 Appellant's appeal because the notice of appeal was not filed
26 timely. In relevant part, Rule 8002(a) states, "The notice of
27 appeal shall be filed with the clerk within 14 days of the date
28 of the entry of the judgment, order, or decree appealed from."

1 The untimely filing of a notice of appeal deprives us of
2 jurisdiction. Slimick v. Silva (In re Slimick), 928 F.2d 304,
3 306 (9th Cir. 1990); Greene v. United States (In re Souza), 795
4 F.2d 855, 857 (9th Cir. 1986). Debtor's argument is that since
5 the Judgment was entered on May 13, 2010, with no reservation for
6 an award of attorney's fees, the appeal period ran 14 days later,
7 on May 27, 2010, with no notice of appeal having been filed.
8 Accordingly, the Notice of Appeal filed on August 17, 2010 was
9 late, leaving us without jurisdiction to hear the appeal in this
10 case.

11 Debtor's argument raises an interesting procedural question.
12 Civil Rule 54 deals with judgments, costs and attorney's fees.
13 Civil Rule 54(a)-(c) concern the form and content of judgments.
14 Civil Rule 54(d)(1) and (2) concern claims for costs and
15 attorney's fees. Specifically, Civil Rule 54(d)(2)(A) provides
16 that a "claim for attorney's fees . . . must be made by motion
17 unless the substantive law requires those fees to be proved at
18 trial as an element of damages." Rule 7054, applicable in
19 adversary proceedings in bankruptcy, provides in section (a) that
20 "[Civil] Rule 54(a)-(c) . . . applies in adversary proceedings."
21 Rule 7054(b) goes on to address the allowance of costs in
22 adversary proceedings. However, Rule 7054 is silent as to the
23 procedure for requesting allowance of attorney's fees in
24 adversary proceedings. Unfortunately, there is no Advisory
25 Committee Note to Rule 7054 providing any rationale for the
26 omission to incorporate Civil Rule 54(d) for adversary
27 proceedings. 10 Collier on Bankruptcy ¶ 7054.RH (Alan N. Resnick
28

1 and Henry J. Sommer eds., 16th ed. 2010).³

2 Rule 7008(b), discussed in greater detail below, requires
3 that a request for attorney's fees be pled as a claim in a
4 complaint, but it does not shed any light on whether such a claim
5 must be proven at trial or left for determination on application
6 or motion following the trial. Certainly, a claim for attorney's
7 fees could be a subject for the presentation of evidence at
8 trial, but arguably, judicial economy is better served by leaving
9 determination of a reasonable fee award to the prevailing party
10 to follow the trial, when a complete time itemization can be
11 presented to support the fee claim. As with Rule 7054, there is
12 no Advisory Committee Note to Rule 7008(b) giving any procedural
13 guidance as to how to deal with claims for attorney's fees beyond
14 the pleading stage.

15 The Local Rules of Practice for the United States Bankruptcy
16 Court for the Eastern District of California do not include any
17 rule(s) for pursuing a claim for attorney's fees.⁴

18 In this appeal, we do not face the situation confronted by
19 this Panel and the Ninth Circuit in In re Slimick, where the
20 unappealed order entered in advance of the later judgment
21 included a complete adjudication of the matters at issue. In re

23 ³ We suggest that the Judicial Conference's Advisory
24 Committee on Bankruptcy Rules may want to address this apparent
25 "gap" in Rule 7054.

26 ⁴ In contrast, Rule 293(a) ([Civil Rule] 54) of the Local
27 Rules of the United States District Court for the Eastern
28 District of California provides that, "Motions for awards of
attorneys' fees to prevailing parties pursuant to statute shall
be filed not later than twenty-eight (28) days after entry of
final judgment." (Emphasis added.)

1 Slimick, 928 F.2d at 307-08. The Judgment simply does not
2 address Appellant's attorney's fee claim, even though Appellant's
3 counsel mentioned the claim for attorney's fees in her opening
4 statement at the trial. If the bankruptcy court considered the
5 Judgment to be a complete adjudication of the issues between
6 Appellant and the Debtor, it could have so stated at the
7 beginning of the hearing on the Fee Motion. Instead, the
8 bankruptcy court heard argument and based its decision to dismiss
9 the Fee Motion on its conclusion that the Complaint did not state
10 a claim for attorney's fees.

11 In these circumstances, we conclude that no provision of the
12 Rules proscribed the Appellant's request for an award of
13 attorney's fees through the Fee Motion following the trial of the
14 Adversary Proceeding. The bankruptcy court documented its final
15 determination of the Fee Motion in the Minute Order entered on
16 August 13, 2010. Appellant filed its Notice of Appeal of the
17 Minute Order on August 17, 2010, well within the 14 day appeal
18 period mandated by Rule 8002(a). Accordingly, we conclude that
19 Appellant's appeal is timely.

20 II. The Complaint provided adequate notice to Debtor of
21 Appellant's attorney's fee claim.

22 Since the decision of the Supreme Court in Travelers Cas. &
23 Sur. Co. v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007), the
24 allowance of claims for attorney's fees in bankruptcy generally
25 is recognized as governed by state law. Id. at 450-51. This is
26 particularly true in exception to discharge cases, such as the
27 Adversary Proceeding, where the litigation ordinarily has no
28

1 direct impact on the bankruptcy estate.⁵

2 Under the American Rule, "the prevailing litigant is
3 ordinarily not entitled to collect a reasonable attorneys' fee
4 from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
5 421 U.S. 240, 247 (1975). However, this general rule can be
6 overcome by statute or by an "enforceable contract" allocating
7 attorney's fees. Fleischmann Distilling Corp. v. Maier Brewing
8 Co., 386 U.S. 714, 717 (1967). See also Busson-Sokolik and Prag
9 v. Milwaukee Sch. of Eng'g (In re Busson-Sokolik), ___ F.3d ___
10 Nos. 08-4317, 09-4009 & 10-1456, at pp. 8-9 (7th Cir. Feb. 10,
11 2011). In California, § 1021 of the California Code of Civil
12 Procedure provides exactly that:

13 Except as attorney's fees are specifically provided for
14 by statute, the measure and mode of compensation of
15 attorneys and counselors at law is left to the
16 agreement, express or implied, of the parties

17 See, e.g., Aozora Bank, Ltd. v. 1333 North Cal. Blvd, 15 Cal.
18 Rptr.3d 340, 341 (2004).

19 In this case, Appellant relies on the provisions for
20 attorney's fees in the Promissory Note and Guarantee, as
21 discussed above, supported by the provisions of the Replacement
22 Guaranty that 1) the provisions of the Promissory Note and

23 ⁵ Before the Supreme Court, the appellee Pacific Gas &
24 Electric Co. ("Pacific") argued that allowance of unsecured
25 contract claims for postpetition attorney's fees was proscribed
26 by § 506(b). The Supreme Court declined to address that argument
27 because it had not been raised by Pacific before the bankruptcy
28 court or earlier in the appeal process. Id. at 454-56. Whatever
the merits of that argument in a claim allowance contest, it has
no application in litigation over whether a claim should be
excepted from the debtor's discharge, as in the Adversary
Proceeding. See Cohen v. De la Cruz, 523 U.S. 213 (1998).

1 Guarantee would "remain in full effect," and 2) the Debtor agreed
2 to accept responsibility for all liability under the Promissory
3 Note and Guarantee. Appellant's claim for attorney's fees
4 accordingly arises out of the terms of the parties' written
5 contracts. Appellant argues that once it prevailed on its
6 § 523(a)(2)(B) claim, the agreements entitled it to a judgment
7 enhanced by its attorney's fees generated to establish and
8 collect its claim.

9 The bankruptcy court dismissed Appellant's Fee Motion based
10 on its determination that Appellant did not state a claim for
11 attorney's fees in its Complaint consistent with the requirements
12 of Rule 7008(b). Rule 7008 sets forth general rules for
13 pleadings in adversary proceedings in bankruptcy. Rule 7008(b)
14 states that, "A request for an award of attorney's fees shall be
15 pleaded as a claim in a complaint" ⁶ However, Rule
16 7008(a) provides that Civil Rule 8 generally applies in adversary
17 proceedings. Civil Rule 8 lays out general rules for pleading in
18 litigation in federal court. Civil Rule 8(a)(2) provides that a
19 claim for relief must contain no more than "a short and plain
20 statement of the claim showing that the pleader is entitled to
21 relief"

22 The pleading provisions in the Civil Rules are intended to
23 provide parties with adequate notice of the opposing party's
24 claims or defenses.

25
26 ⁶ It is not clear from the transcript of the hearing on the
27 Fee Motion whether the bankruptcy court dismissed it because
28 Appellant did not state a claim for attorney's fees in its "First
Claim for Relief" or because Appellant did not include a separate
"Second Claim for Relief," specifically addressing its claim for
attorney's fees. See Hr'g Tr. (Aug. 3, 2010) at 10-12.

1 [T]he Federal Rules of Civil Procedure do not require a
2 claimant to set out in detail the facts upon which he
3 bases his claim. To the contrary, all the [Civil]
4 Rules require is "a short and plain statement of the
5 claim" that will give the defendant fair notice of what
6 the plaintiff's claim is and the grounds upon which it
7 rests Such simplified "notice pleading" is made
8 possible by the liberal opportunity for discovery and
9 the other pretrial procedures established by the
[Civil] Rules to disclose more precisely the basis of
both claim and defense and to define more narrowly the
disputed facts and issues The [Civil] Rules
reject the approach that pleading is a game of skill in
which one misstep by counsel may be decisive to the
outcome and accept the principle that the purpose of
pleading is to facilitate a proper decision on the
merits.

10 Conley v. Gibson, 355 U.S. 41, 47-48 (1957), abrogated on other
11 grounds by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). See
12 Swierkiewicz v. Soreme N.A., 534 U.S. 506, 512-14 (2002);
13 Securities Investor Prot. Corp. v. Capital City Bank (In re
14 Meridian Asset Mgmt, Inc.), 296 B.R. 243, 249 (Bankr. N.D. Fla.
15 2003).

16 Factual allegations in a complaint "must be enough to raise
17 a right to relief above the speculative level," Bell Atl. Corp.
18 v. Twombly, 550 U.S. at 555, and must be adequate to "state a
19 claim to relief that is plausible on its face." Ashcroft v.
20 Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009). However,
21 dismissal on the pleadings is appropriate only if the complaint
22 fails to plead facts sufficient "to raise a reasonable
23 expectation that discovery will reveal evidence" supporting
24 relief. Bell Atl. Corp. v. Twombly, 550 U.S. at 556.

25 In this appeal, the Complaint clearly stated in its first
26 paragraph that Appellant sought an award of attorney's fees from
27 the Debtor. In Paragraph 1 of the Complaint, Appellant
28 identified the Promissory Note as a basis for its claim. In

1 Paragraph 7 of the Complaint, Appellant referenced the Debtor's
2 execution of the Replacement Guarantee. In Paragraph 10 of the
3 Complaint, Appellant noted that it previously filed a complaint
4 against the Debtor in the Marin County Superior Court seeking
5 damages including attorney's fees. In its First Claim for Relief
6 in the Complaint, Appellant realleged the first 18 paragraphs of
7 the Complaint, including Paragraphs 1, 7 and 10. Finally, in its
8 Prayer for Relief, Appellant requested a judgment for damages
9 "including principal, accrued and accruing interest, costs, and
10 attorney's fees." In these circumstances, the Debtor cannot have
11 been surprised that Appellant was asserting a claim for
12 attorney's fees in the Complaint.

13 The Debtor expressed no such surprise. Indeed, in his
14 Answer to the Complaint, the Debtor included a claim for an award
15 of reasonable attorney's fees in his prayer for relief (without
16 stating such a claim in any other part of the Answer). The
17 Promissory Note, Guarantee and Replacement Guarantee do not
18 provide for any right to attorney's fees for the Debtor.
19 However, in an action based on such agreements, California Civil
20 Code § 1717(a) provides reciprocal rights to attorney's fees for
21 the prevailing party. Cal. Civ. Code § 1717(a);⁷ Kachlon v.

22
23 ⁷ Cal. Civ. Code § 1717(a) provides:

24
25 In an action on a contract, where the contract
26 specifically provides that attorney's fees and costs,
27 which are incurred to enforce that contract, shall be
28 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,

(continued...)

1 Markowitz, 85 Cal. Rptr. 532, 556 (Cal. Ct. App. 2008) (affirming
2 the statute makes "unilateral attorney fee clauses reciprocal");
3 Brittalia Ventures v. Stuke Nursery Co., Inc., 62 Cal. Rptr. 3d
4 467, 477 (Cal. Ct. App. 2007) (statute "prevents the oppressive
5 use of one-sided attorney fee provisions"). We conclude that it
6 is unlikely that the Debtor would assert a right to reasonable
7 attorney's fees in these circumstances without being aware that
8 Appellant was seeking attorney's fees against him, based on
9 provisions of the Promissory Note and the Replacement Guarantee.

10 In addition, in his opposition to the Fee Motion and at the
11 hearing on the Fee Motion, the Debtor made several arguments
12 opposing the fee award requested by Appellant, including
13 unreasonableness of the amount requested, but never asserted that
14 he did not receive notice of Appellant's claim for attorney's
15 fees from the Complaint.

16 There are few case authorities that deal with the adequacy
17 of pleadings to assert a claim for attorney's fees for purposes
18 of Rule 7008(b). The Debtor cites Garcia v. Odom (In re Odom),
19 113 B.R. 623 (Bankr. C.D. Cal. 1990). In Odom, the bankruptcy
20 court deemed the plaintiffs' claim for attorney's fees
21 insufficient under Rule 7008(b) because it only was included in
22 the plaintiffs' prayer for relief, rather than in the body of the
23 complaint. See also Hartford Police F.C.U. v. DeMaio (In re
24 DeMaio), 158 B.R. 890, 891-93 (Bankr. D. Conn. 1993).

25 In Ramsey v. Countrywide Home Loans, Inc. (In re Ramsey),

27
28 ⁷(...continued)
shall be entitled to reasonable attorney's fees in
addition to other costs.

1 424 B.R. 217 (Bankr. N.D. Miss. 2009), the plaintiff relied on an
2 even more problematic basis to assert his attorney's fee claim:
3 he requested an award of attorney's fees in final argument at the
4 trial in conjunction with a motion for leave to amend his
5 complaint accordingly, where the complaint did not include any
6 request or claim for attorney's fees at all. The bankruptcy
7 court denied his motion and his plea for attorney's fees based on
8 Rule 7008(b). Id. at 226.

9 This case is distinguishable from both Odom and Ramsey
10 because Appellant's claim for attorney's fees is stated in the
11 preamble and referenced in the body of the Complaint as well as
12 in the Prayer for Relief. Supporting factual allegations are
13 included in various paragraphs in the body of the Complaint.

14 The Debtor also argues that Appellant's Complaint is
15 deficient in that Appellant's claim for attorney's fees is not
16 pled with sufficient specificity under Civil Rule 9(g), citing
17 United Indus., Inc. v. Simon-Hartley, Ltd., 91 F.3d 762 (5th Cir.
18 1996); Maidmore Realty Co., Inc. v. Maidmore Realty Co., Inc.,
19 474 F.2d 840 (3d Cir. 1973); and Botosan v. Fitzhugh, 13 F. Supp.
20 2d 1047 (S.D. Cal. 1998). These authorities stand for the
21 general proposition that claims for attorney's fees are claims
22 for "special damages" that must be specifically pleaded under
23 Civil Rule 9(g).⁸ Under Rule 7009, all of Civil Rule 9 applies
24 in adversary proceedings in bankruptcy.

25
26 ⁸ Civil Rule 9(g) provides: "If an item of special damage
27 is claimed, it must be specifically stated." The Ninth Circuit
28 has not yet specifically addressed whether claims for attorney's
fees are items of special damage.

1 The Debtor did not refer to either Civil Rule 9(g) or Rule
2 7009 in his opposition to the Fee Motion or at the hearing on the
3 Fee Motion. Ordinarily, we do not consider arguments that were
4 neither raised nor addressed before the bankruptcy court. See
5 Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168-69
6 (2004). However, we can consider an argument not raised
7 specifically before the bankruptcy court as a matter of
8 discretion, and we will do so here. See, e.g., Hi Tech
9 Communications Corp. v. Poughkeepsie Bus. Park, LLC (In re
10 Wheatfield Bus. Park, LLC), 308 B.R. 463, 466 (9th Cir BAP 2004)
11 (recognizing discretion to consider argument raised for first
12 time on appeal if issue is matter of law and either does not
13 depend on the factual record or the pertinent record has been
14 fully developed).

15 What the authorities cited above seem to be saying about
16 claims for attorney's fees as special damages is that the
17 claimant can receive no more than it pleads for specifically. In
18 other words, if an attorney's fee claim is asserted generally in
19 a complaint, the prevailing claimant will be entitled to the
20 reasonable fees generated in prosecuting that complaint, but will
21 not be entitled to a further award for fees generated in related
22 proceedings, for example. See Maidmore Realty Co., Inc., 474
23 F.2d at 843. The Debtor raised the substance of this argument
24 before the bankruptcy court in opposing Appellant's request for
25 attorney's fees to the extent it included fees generated in
26 prosecuting Appellant's action in the Marin County Superior Court
27 against the Debtor, among other things. This is an argument that
28 can be renewed on remand, but it does not preclude Appellant from

1 asserting the general claim for attorney's fees in the Adversary
2 Proceeding that is articulated in the Complaint.

3 We ultimately conclude that the Complaint, from its preamble
4 through the Prayer for Relief, included adequate information and
5 supporting factual allegations to provide the Debtor with notice
6 that Appellant was asserting a claim for attorney's fees against
7 the Debtor in the Adversary Proceeding based on the provisions of
8 the Promissory Note and the Replacement Guarantee. Rule 7008(b)
9 requires no more, and the bankruptcy court erred in concluding
10 that it did.

11 CONCLUSION

12 For the foregoing reasons, we VACATE the bankruptcy court's
13 dismissal of Appellant's Fee Motion and REMAND for the bankruptcy
14 court to determine an appropriate fee award to Appellant as the
15 prevailing party in the Adversary Proceeding.