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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	NV-10-1298-KiDH
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SEAN L. DINAN and STACEY M. DINAN,)	Bk. No.	07-50089
)		
Debtors.)	Adv. No.	07-05073
)		
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HARRY C. FRY,)		
)		
Appellant,)		
)		
v.)		
)		
SEAN L. DINAN; STACEY M. DINAN,)		
)		
Appellees.)		
)		

O P I N I O N

Argued and Submitted on February 18, 2011
at Las Vegas, Nevada

Filed - April 22, 2011

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable John L. Peterson, Bankruptcy Judge, Presiding.

Appearances: Carole Marie Pope argued for appellant, Harry Fry
Christopher Burke argued for appellees, Sean and
Stacey Dinan

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

1 KIRSCHER, Bankruptcy Judge:

2

3 In this appeal, we address an issue of first impression in
4 this or any other circuit: whether an award of attorney's fees
5 and/or costs in connection with a judgment under 11 U.S.C.
6 § 523(a)(14)¹ is nondischargeable. We conclude that it is.

7 Appellant, Dr. Harry C. Fry ("Fry"), appeals an order from
8 the bankruptcy court awarding Fry attorney's fees and costs in
9 connection with a denial of discharge and nondischargeability
10 action he prosecuted against appellees-debtors, Sean L. Dinan
11 ("Sean") and Stacey M. Dinan ("Stacey") (collectively "Dinans").
12 We AFFIRM the costs award. However, we VACATE the attorney's fee
13 award and REMAND that issue to the bankruptcy court for a
14 reasonableness determination under Nevada law.

15 **I. FACTS AND PROCEDURAL BACKGROUND**

16 **A. Factual Background.**

17 On or around October 10, 2003, Fry loaned Dinans \$165,000 for
18 their sole proprietorship, Terra Firma, as evidenced by a written
19 Agreement to Loan Money and Promissory Note ("Loan"). The
20 Promissory Note includes an acceleration clause which states that
21 "the entire sum of principal and interest, including guaranteed
22 interest, then unpaid, plus any prepayment penalties," would
23 become due and payable upon either party filing bankruptcy. The
24 Promissory Note also includes an attorney's fees clause:

25 Each maker agrees to pay all costs and expenses incurred
26 in enforcing collection of any portion of this note by

27 ¹ Unless specified otherwise, all chapter and code references
28 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal
Rules of Bankruptcy Procedure, Rules 1001-9037.

1 suit or otherwise, including a reasonable attorney's
2 fee, if an attorney is used in such collection. If suit
3 is instituted for collection, the Court shall adjudge
4 the attorney's fee allowed.

4 In exchange for the Loan, Dinans gave Fry a security interest in
5 various construction equipment and vehicles used in their
6 business. Fry perfected his security interest in the equipment
7 and vehicles by filing a UCC-1 Statement with the Nevada Secretary
8 of State.

9 The Dinans eventually defaulted on the Loan in August 2005.
10 On or around July 10, 2006, Fry sent Dinans a letter informing
11 them of their default of 12 months and that he was commencing
12 foreclosure proceedings per the Loan. Fry requested that Dinans
13 turn over the equipment and vehicles given as security so that he
14 could take possession of them. About one month later, on August
15 4, 2006, Fry sent Dinans a follow-up letter stating that he would
16 soon be selling the equipment and vehicles, about which Dinans
17 would receive notice, but that certain items given as collateral
18 had not yet been turned over to Fry. Fry asked Dinans to turn
19 over the missing items and/or any proceeds they received if they
20 had sold any of these items.

21 On October 6, 2006, Fry caused to be published in the Reno
22 Gazette-Journal a Notification of Disposition of Collateral
23 ("Notice of Sale"). On that same date, Fry sent Dinans a
24 certified copy of the Notice of Sale. On October 21, 2006, Fry
25 held an auction for the equipment and vehicles. Four vehicles
26 were sold for a total of \$12,550. Fry later sold some other
27 pieces of equipment; a few smaller items Fry repossessed were
28 stolen. Fry attempted to conduct another auction for the

1 remaining items, but no auction company was interested in holding
2 the sale because of the items' poor condition. Ultimately, Fry
3 realized about \$16,000 in selling the collateral, which included a
4 credit for the stolen items.

5 In January 2007 Fry filed a collection action against Dinans
6 in state court, but the case was stayed once Dinans filed a
7 voluntary chapter 7 petition for relief on February 1, 2007.

8 **B. Procedural History.**

9 **1. Proceedings for Fry's Denial of Discharge and**
10 **Nondischargeability Actions.**

11 On May 7, 2007, Fry filed a complaint seeking to deny Dinans
12 a discharge under sections 727(a)(2)(a), (a)(4), and (a)(5), and
13 to determine the Loan as a nondischargeable debt under sections
14 523(a)(2) and (a)(4).² Fry later amended his two
15 nondischargeability claims for one claim under section
16 523(a)(14).³ Fry alleged that the Loan was nondischargeable
17 because Dinans had used the proceeds to pay outstanding 940 and
18 941 payroll taxes owed to the IRS. In their answer, Dinans denied
19 all of Fry's allegations, specifically denying that the Loan was
20

21 ² The bankruptcy court determined that Fry failed to meet his
22 burden for any claim under section 727(a). Fry does not appeal
23 that ruling. Therefore, we discuss only facts pertinent to Fry's
prevailing nondischargeability claim.

24 ³ At a pretrial hearing, the bankruptcy court questioned why
25 Fry asserted a nondischargeability claim under sections 523(a)(2)
26 and (a)(4) as opposed to section 523(a)(14). In response, Fry
27 said that his claims for relief under sections 523(a)(2) and
28 (a)(4) were a typographical error, and he moved to amend the
complaint to include a claim for relief under section 523(a)(14),
to which Dinans objected. The bankruptcy court never ruled on the
motion, but Dinans made no objections at trial regarding any
evidence supporting such a claim.

1 used to pay taxes owed to the IRS.

2 In his pretrial brief, Fry contended that Dinans' outstanding
3 payroll tax debt was at least \$104,861.83 according to a September
4 3, 2003 balance sheet for Terra Firma. Fry contended that Dinans
5 needed the Loan to pay this amount to stay in business, and it was
6 for this purpose that Fry made the Loan. Fry further contended
7 that the total deficiency owed to him by Dinans was \$193,477.36,
8 which included the unpaid principal, interest, late charges, an
9 advance of \$1,500, and a \$16,000 credit for monies Fry realized in
10 selling the collateral.

11 Dinans conceded that the total deficiency owed to Fry was
12 \$193,477.36, but contended that they were not obligated to pay it
13 because Fry failed to give proper notice of the sale of the
14 collateral under NEV. REV. STAT. § 482.516.⁴ Therefore, Dinans

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16 ⁴ NEV. REV. STAT. § 482.516 provides:

17 1. Any provision in any security agreement for the sale or lease
18 of a vehicle to the contrary notwithstanding, at least 10 days'
19 written notice of intent to sell or again lease a repossessed
20 vehicle must be given to all persons liable on the security
21 agreement. The notice must be given in person or sent by mail
22 directed to the address of the persons shown on the security
23 agreement, unless such persons have notified the holder in writing
24 of a different address.

25 2. The notice:

26 (a) Must set forth that there is a right to redeem the
27 vehicle and the total amount required as of the date of the
28 notice to redeem;

(b) May inform such persons of their privilege of
reinstatement of the security agreement, if the holder
extends such a privilege;

(c) Must give notice of the holder's intent to resell or
again lease the vehicle at the expiration of 10 days from the
date of giving or mailing the notice;

(d) Must disclose the place at which the vehicle will be
returned to the buyer or lessee upon redemption or
reinstatement; and

28

(continued...)

1 asserted that because Fry had no enforceable claim, he had no
2 standing to bring a nondischargeability action against them.

3 The bankruptcy court held a one-day trial on Fry's claims on
4 January 13, 2010. At the start of trial, the parties moved to
5 admit Exhibit #1 - written factual stipulations the parties agreed
6 upon the night before. In the stipulation, Dinans conceded the
7 following facts:

- 8 • Dinans represented to Fry that they would use the Loan
9 proceeds in part for paying outstanding payroll taxes to the
10 IRS;
- 11 • Dinans deposited the \$165,000 proceeds into their bank
12 account on October 13;
- 13 • on October 13, 2003, Dinans' bank account reflected a deficit of
14 \$32,193.22;
- 15 • between October 13, 2003 and October 30, 2003, Dinans made
16 deposits into their account from other sources which totaled
17 \$113,106.88;
- 18 • between October 13, 2003 and October 30, 2003, checks and
19 other withdrawals from Dinans' bank account totaled
20 \$115,738.77;
- 21 • on October 30, 2003, Dinans paid the IRS \$107,001.32 with two
22 checks, one for \$62,506.08 and the other for \$44,495.24.

The bankruptcy court announced orally its decision in favor of

23 ⁴(...continued)

24 (e) Must designate the name and address of the person to whom
25 payment must be made.

26 3. During the period provided under the notice, the person or
27 persons liable on the security agreement may pay in full the
28 indebtedness evidenced by the security agreement. Such persons are
liable for any deficiency after sale or lease of the repossessed
vehicle only if the notice prescribed by this section is given
within 60 days after repossession and includes an itemization of
the balance and of any costs or fees for delinquency, collection
or repossession. In addition, the notice must either set forth the
computation or estimate of the amount of any credit for unearned
finance charges or cancelled insurance as of the date of the
notice or state that such a credit may be available against the
amount due.

1 Dinans on the section 727 claims. However, it reserved ruling on
2 the nondischargeability claim and requested that the parties
3 submit further briefing about the Notice of Sale under Nevada law.

4 In his post-trial brief, Fry contended that NEV. REV. STAT.
5 § 104.9613⁵ applied in this case because it governs the
6 disposition of collateral under the UCC; i.e., selling pieces of
7 equipment and vehicles given as security for a loan to a business.
8 Contrary to Dinans' position, Fry argued that NEV. REV. STAT.
9 § 482.516 applied only to sellers or lessors selling a consumer's
10 repossessed vehicle. Finally, Fry contended that per the terms of
11 the Promissory Note he was entitled to attorney's fees.

12
13

 ⁵ NEV. REV. STAT. § 104.9613 provides:

14 Except in a consumer-goods transaction, the following rules apply:

15 1. The contents of a notification of disposition are sufficient
16 if the notification:

- 17 (a) Describes the debtor and the secured party;
18 (b) Describes the collateral that is the subject of the
19 intended disposition;
20 (c) States the method of intended disposition;
21 (d) States that the debtor is entitled to an accounting of
22 the unpaid indebtedness and states the charge, if any, for an
23 accounting; and
24 (e) States the time and place of a public disposition or the
25 time after which any other disposition is to be made.

26 2. Whether the contents of a notification that lacks any of the
27 information specified in subsection 1 are nevertheless sufficient
28 is a question of fact.

29 3. The contents of a notification providing substantially the
30 information specified in subsection 1 are sufficient, even if the
31 notification includes:

- 32 (a) Information not specified by that subsection; or
33 (b) Minor errors that are not seriously misleading.

34 4. A particular phrasing of the notification is not required.

35 5. The following form of notification and the form appearing in
36 subsection 3 of NRS 104.9614, when completed, each provides
37 sufficient information:

1 Dinans argued that only two issues remained to be decided:
2 what portion of the Loan proceeds went to pay taxes, and whether
3 Fry's Notice of Sale violated Nevada law. Dinans asserted that
4 because of the subsequent withdrawals they made on their account
5 before they paid the IRS on October 30, but after depositing the
6 Loan proceeds on October 13, only a portion of the \$107,001.32
7 could be traced to the IRS payments based on a first-in first-out
8 ("FIFO") accounting approach. Hence, only \$17,068.01 could be
9 traced to the IRS, and only that amount would be nondischargeable,
10 presuming Fry's Notice of Sale complied with Nevada law, which
11 Dinans disputed.

12 If NEV. REV. STAT. § 104.9613 applied, the parties agreed that
13 Fry's Notice of Sale was sufficient and he would be entitled to a
14 nondischargeable deficiency judgment. Conversely, if NEV. REV.
15 STAT. § 482.516 applied, the parties agreed that Fry's Notice of
16 Sale was not sufficient and his claim failed.

17 On March 1, 2010, the bankruptcy court issued its Findings of
18 Fact, Conclusions of Law and Order. The court rejected Dinans'
19 tracing and FIFO theories and determined that their payments to
20 the IRS totaling \$107,001.32 represented a nondischargeable
21 obligation to Fry under section 523(a)(14).⁶ However, the court
22 agreed with Dinans that NEV. REV. STAT. § 482.516 applied.
23 Accordingly, Fry's Notice of Sale was insufficient, he was
24 considered paid in full, and his deficiency claim was barred. The

25 ⁶ Section 523(a)(14) provides in relevant part:

26 “(a) A discharge under section 727 . . . does not discharge
27 an individual debtor from any debt—
28 (14) incurred to pay a tax to the United States that
 would be nondischargeable pursuant to paragraph (1).”

1 court entered a judgment in favor of Dinans on March 4, 2010,
2 dismissing the adversary proceeding.

3 Fry moved to alter or amend the March 4 judgment ("Rule 9023
4 Motion"), contending that the bankruptcy court misapplied Nevada
5 law; legislative history showed that § 482.516 did not apply in
6 this case. Therefore, contended Fry, his Notice of Sale was
7 proper under § 104.9613, and he was entitled to a nondischargeable
8 judgment under section 523(a)(14) for \$107,001.32. Dinans opposed
9 the Rule 9023 Motion.

10 The bankruptcy court entered an order on Fry's Rule 9023
11 Motion on April 14, 2010. The court reversed its decision and
12 concluded that NEV. REV. STAT. § 104.9613 applied; therefore, Fry's
13 Notice of Sale was proper and he was entitled to a deficiency.
14 However, even though Dinans made no request for relief from the
15 March 4 judgment, the court reversed itself and accepted Dinans'
16 tracing and FIFO theories. As a result, Fry was entitled to a
17 nondischargeable judgment under section 523(a)(14), but only for
18 \$17,068.01. On April 26, 2010, the bankruptcy court entered an
19 amended judgment memorializing its decision set forth in the April
20 14 order.

21 **2. Proceedings for Fry's Attorney's Fees and Costs.**

22 On May 4, 2010, Fry filed a Bill of Costs for filing fees,
23 service of the summons and complaint, witness fees, deposition
24 costs, and process server fees for a total of \$2,366.87. In
25 support of the bill, Fry's counsel, Carole M. Pope ("Pope"), filed
26 an affidavit with receipts for the expenses.

27 Dinans objected to Fry's Bill of Costs and filed a Motion to
28 Retax Costs. Dinans argued that a majority of the costs were

1 related to Fry's section 727 claims, which were determined in
2 Dinans' favor. Specifically, Dinans argued that no discovery was
3 necessary with respect to the issues under section 523(a)(14)
4 because the parties had entered into a stipulated version of the
5 facts. Dinans further contended that Fry was not entitled to any
6 costs under Rule 7054(b)⁷ because he was not the prevailing party.

7 Fry opposed Dinans' Motion to Retax Costs contending that not
8 all costs were related to the section 727 claims. Specifically,
9 Fry contended that even though the parties had stipulated to the
10 facts supporting Fry's section 523(a)(14) claim, Dinans did not
11 admit these facts until the day before trial. Fry further
12 contended that, despite repeated promises from Dinans' counsel, he
13 also did not receive Dinans' financial records reflecting the
14 amount of taxes paid until the day before trial. Moreover, Fry
15 argued, the depositions of Sean, Stacey, and Fry focused primarily
16 on the whereabouts of certain collateral securing the loan that
17 was never found and whether Fry's Notice of Sale was proper.
18 Finally, Fry argued that he was the prevailing party and entitled
19 to costs because he received a judgment for a portion of the debt.

20 Shortly after filing his Bill of Costs, Fry moved for
21 attorney's fees ("Motion for Attorney's Fees") on May 10, 2010,
22 requesting \$55,361.50, or an "amount[] as the Court determine[d]
23 to be reasonable" Fry contended that, as the prevailing
24 party in a collection suit, he was entitled to reasonable

25
26 ⁷ Rule 7054(b) provides in relevant part:

27 "The court may allow costs to the prevailing party except
28 when a statute of the United States or these rules otherwise
provides."

1 attorney's fees per the terms of the Promissory Note. In support
2 of his motion, Fry included copies of Pope's itemized time records
3 and an affidavit from Pope.

4 Dinans opposed Fry's motion contending that not only was
5 Fry's fee request more than three times what he recovered, but
6 that Fry was not entitled to any attorney's fees because he
7 prevailed only on a federal issue, nondischargeability under
8 section 523(a)(14), not a state law issue.

9 In his reply, Fry countered that a state law issue was
10 decided, Fry's Notice of Sale under Nevada law, which Dinans
11 contested. Fry asserted that before the bankruptcy court could
12 determine whether or not the debt was nondischargeable under
13 section 523(a)(14), it had first to determine the enforceability
14 of the debt under state law. In other words, Fry's
15 nondischargeability claim rested entirely on whether he provided a
16 proper Notice of Sale. Therefore, asserted Fry, he was entitled
17 to reasonable attorney's fees under Nevada law.

18 The bankruptcy court heard Fry's Bill of Costs, Dinans'
19 Motion to Retax Costs, and Fry's Motion for Attorney's Fees on
20 June 23, 2010. Pope contended that Fry's entitlement to
21 attorney's fees was supported by Cohen v. de la Cruz, 523 U.S. 213
22 (1998). Upon Pope's statement, the court responded:

23 I'm familiar with the case. It looks to me like what
24 we've done here is you came in with a non-727 case, and
25 that was all denied. And most of the depositions you've
26 taken with the bank officers and the so forth attached
to the evidence that had to do with the 727. It
certainly didn't have to do - anything to do with what I
finally did in the final Order.

27 And I just think that with regard to the attorney fees
28 of \$55,361.50, if I proportion that out against your
request for recovery of \$165,000 versus what you've got,

1 about \$17,000 would be about ten percent. And that's
2 about the - what you've recovered.

3 And I just - that fee to me is just absolutely
4 exorbitant, and I'm not going to award such a fee for
5 such a recovery. That's three times the - for recovery.
6 That's not reasonable.

7 And as far as the costs are concerned, I've went over
8 those; It seems to me that those are all related
9 to the 727 provisions in the Complaint. . . . And I
10 don't see how they touched upon the Final Judgment that
11 I gave you

12 Hr'g Tr. 4:2-25 (June 23, 2010). Ultimately, the bankruptcy court
13 awarded Fry \$337 in costs for filing and service fees, and awarded
14 him \$2,000 for attorney's fees. An order was entered to that
15 effect on July 21, 2010. Fry timely appealed.

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
18 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

19 **III. ISSUES**

- 20 1. Did the bankruptcy court abuse its discretion by awarding Fry
21 only \$2,000 out of \$55,361.50 requested in attorney's fees?
- 22 2. Did the bankruptcy court abuse its discretion by awarding Fry
23 only \$337 out of \$2,366.87 requested in costs?

24 **IV. STANDARD OF REVIEW**

25 We review a bankruptcy court's determination on attorney's
26 fees for abuse of discretion or erroneous application of the law.
27 Bertola v. N. Wisc. Produce Co. (In re Bertola), 317 B.R. 95, 99
28 (9th Cir. BAP 2004). In applying an abuse of discretion test, we
first determine de novo whether the bankruptcy court identified
the correct legal rule to apply to the relief requested. United
States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If it
did, we then determine whether its "application of the correct

1 legal standard [to the facts] was (1) illogical, (2) implausible,
2 or (3) without support in inferences that may be drawn from the
3 facts in the record.” Id. (internal quotation marks omitted). If
4 the bankruptcy court did not identify the correct legal rule, or
5 its application of the correct legal standard to the facts was
6 illogical, implausible, or without support in inferences that may
7 be drawn from the facts in the record, then the bankruptcy court
8 has abused its discretion. Id.

9 To the extent the issue is whether Nevada law allows the
10 award of attorney’s fees, our review is de novo. Bertola, 317
11 B.R. at 99.

12 V. DISCUSSION

13 A. The Bankruptcy Court Abused Its Discretion When It Awarded 14 Fry Only \$2,000 In Attorney’s Fees.

15 1. Elements of a Section 523(a) (14) Claim.

16 Section 523(a) (14) excepts from discharge any debt incurred
17 to pay a tax to the United States if that tax would be
18 nondischargeable under section 523(a) (1).⁸ Taxes nondischargeable
19 under section 523(a) (1) include 940 and 941 employer payroll
20 taxes. See section 507(a) (8) (C).⁹

21
22 ⁸ Section 523(a) (1) provides in relevant part:

23 A discharge under section 727 . . . does not discharge an
24 individual debtor from any debt—
25 (1) for a tax or a customs duty—
26 (A) of the kind and for the periods specified in section
27 507(a) (3) or 507(a) (8) of this title, whether or not a
28 claim for such tax was filed or allowed[.]

⁹ Section 507(a) (8) (C) provides in relevant part:

The following expenses and claims have priority in the
(continued...)

1 Section 523(a) (14) was added to the Bankruptcy Code in part
2 to limit prebankruptcy substitution of a dischargeable obligation
3 for one that is nondischargeable. Ed Schory & Sons, Inc. v.
4 Francis (In re Francis), 226 B.R. 385, 396 (6th Cir. BAP 1998)
5 (Lundin, J., dissenting); Am. Express Centurion Bank v. Gavin (In
6 re Gavin), 248 B.R. 464, 465 (Bankr. M.D. Fla. 2000) ("Section
7 523(a) (14) eliminates potential benefits of substituting
8 nondischargeable tax debt under [s]ection 523(a) (1) with
9 dischargeable credit card debt."); Am. Express Bank, FSB v. Cook
10 (In re Cook), 416 B.R. 284, 289 (Bankr. W.D. Va. 2009) (same).

11 To prevail on a claim under section 523(a) (14), the creditor
12 must show that: (1) the debt was incurred to pay a tax to the
13 United States; and (2) the tax owed to the United States would
14 have been nondischargeable under section 523(a) (1) if it had not
15 been paid prepetition. Ramey v. Barton (In re Barton), 321 B.R.
16 877, 879 (Bankr. N.D. Ohio 2005). Some bankruptcy courts further
17 require the creditor to trace the portion of the debt attributable
18 to paying the tax. See MBNA Am. v. Chrusz (In re Chrusz), 196
19 B.R. 221, 224 (Bankr. D.N.H. 1996).

20 **2. Cohen v. de la Cruz controls.**

21 The bankruptcy court did not set forth its reasoning why it
22 awarded Fry attorney's fees, only that it was doing so in the
23 amount of \$2,000. We now analyze whether Fry was entitled to

24 _____
25 ⁹(...continued)
26 following order:

- 27 (8) Eighth, allowed unsecured claims of governmental units,
28 only to the extent that such claims are for—
(C) a tax required to be collected or withheld and for
which the debtor is liable in whatever capacity.

1 attorney's fees in connection with his nondischargeability claim
2 under section 523(a)(14).¹⁰

3 Attorney's fees, under the American Rule, ordinarily are not
4 recoverable by the prevailing party in an action except by
5 contract or by statute. Alyeska Pipeline Serv. Co. v. Wilderness
6 Soc'y, 421 U.S. 240, 257 (1975). Further, no general right to
7 receive attorney's fees exists under the Bankruptcy Code.
8 Bertola, 317 B.R. at 99.¹¹

9 In a post-Travelers¹² context, the Panel confirmed in Levitt
10 v. Cook (In re Levitt), BAP No. AZ-07-1166 (9th Cir. BAP July 22,
11 2008), that while Travelers supports the proposition that an
12 unsecured creditor may assert a postpetition claim against the

13
14
15 ¹⁰ On appeal, Dinans argue that Fry was not entitled to any
16 attorney's fees. However, Dinans conceded at oral argument that
17 they did not cross appeal the bankruptcy court's ruling on this
18 issue. Absent a cross appeal, we will not consider their
19 argument. See Lee v. Burlington N. Santa Fe Ry. Co., 245 F.3d
20 1102, 1107 (9th Cir. 2001) (without cross appealing a party may
21 only urge to preserve a judgment; it may not seek to decrease its
22 monetary liability).

23 ¹¹ Although Fry cited Cohen at the bankruptcy court hearing
24 and before us at oral argument, he relies upon Ford v. Baroff (In
25 re Baroff), 105 F.3d 439 (9th Cir. 1997), in his brief as the
26 legal basis for his attorney's fees. Baroff held that whether
27 fees may be awarded in bankruptcy proceedings generally depends on
28 whether the case involves state or federal claims and whether the
applicable law allows such fees. 105 F.3d at 441. However, the
Panel held in AT&T Universal Card Servs. Corp. v. Pham (In re
Pham), 250 B.R. 93, 99 (9th Cir. BAP 2000), that Baroff no longer
retains any vitality in nondischargeability actions in light of
Cohen. See also Bertola, 317 B.R. at 99-100 (upholding award of
attorney's fees in action under section 523(a)(6) based on Cohen).

26 ¹² Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.,
27 549 U.S. 443, 452-54 (2007), abrogating Fobian v. W. Farm Credit
28 Bank (In re Fobian), 951 F.2d 1149 (9th Cir. 1991), which held
generally that attorney's fees will not be awarded where the
litigation involves issues peculiar to bankruptcy rather than
issues involving basic contract enforcement.

1 estate for attorney's fees if governing contracts and state law
2 permit such fees, such cases apply to claims against the estate,
3 not to nondischargeable claims against the debtor. In
4 nondischargeability actions, Cohen applies. While we are not
5 bound by our unpublished cases like Levitt, we find it
6 particularly persuasive. See Fed. R. App. P. 32.1; 9th Cir. BAP
7 Rule 8013-1. See also Charlie Y., Inc. v. Carey (In re Carey), --
8 - B.R. ---, 2011 WL 1043903, at *5 (9th Cir. BAP Mar. 4, 2011)
9 (supporting this principle).

10 In Cohen, the Supreme Court held that the discharge exception
11 under section 523(a)(2)(A) applies to all liability arising on
12 account of a debtor's fraudulent conduct. 523 U.S. at 223. To
13 reach this determination, the Court interpreted the statutory
14 language of "debt for" and concluded that the phrase "debt for" as
15 used in section 523 means "debt as a result of," "debt with
16 respect to," or "debt by reason of," and includes as
17 nondischargeable any treble damages, attorney's fees, costs, and
18 "other relief that may exceed the value obtained by the debtor."
19 Id. Because the creditors in Cohen were entitled to treble
20 damages and attorney's fees and costs under state law for the
21 debtor's fraudulent conduct, the entire debt was nondischargeable,
22 including the attorney's fees and costs.

23 Therefore, under Cohen, the determinative question for
24 awarding attorney's fees is whether the creditor would be able to
25 recover the fee outside of bankruptcy under state or federal law.
26 Levitt, BAP No. AZ-07-1166; Bertola, 317 B.R. at 99-100 (if
27 creditor could recover attorney's fees in a nonbankruptcy court
28 those fees will be recoverable); Kilborn v. Haun (In re Haun), 396

1 B.R. 522, 528 (Bankr. D. Idaho 2008) (determining Cohen applies to
2 attorney's fees awards in nondischargeability actions and holding
3 that inquiry for recovery of fees is whether creditor would be
4 entitled to fees in state court for "establishing those elements
5 of the claim which the bankruptcy court finds support a conclusion
6 of nondischargeability.").

7 The Supreme Court did not limit its holding in Cohen to cases
8 only under section 523(a)(2)(A). The Court also cited sections
9 523(a)(1)(B), (a)(4), (a)(6), and (a)(9) as clear examples of
10 instances in which damages, including attorney's fees, that exceed
11 actual damages would be nondischargeable. 523 U.S. at 219-20.
12 Notably, Cohen did not cite section 523(a)(14) specifically,
13 presumably because it does not include the words "debt for" but
14 uses the language "debt incurred to pay." Nonetheless, the
15 Supreme Court in Cohen did cite section 523(a)(1)(B),¹³ which does
16 contain the words "debt for," and the Court read section
17 523(a)(1)(B) in pari materia with section 523(a)(1)(A) and applied
18 the same logic to both.

19 For a claim under section 523(a)(14), the court must read
20 paragraph (a)(14) in conjunction with paragraph (a)(1). Why the
21 Court in Cohen chose to cite subparagraph (B) of section 523(a)(1)

22 ¹³ Section 523(a)(1)(B) provides in relevant part:

23 (a) A discharge under section 727 . . . of this title does
24 not discharge an individual debtor from any debt -

25 (1) for a tax or a customs duty -

26 (B) with respect to which a return, or equivalent report
or notice, if required -

(i) was not filed or given; or

27 (ii) was filed or given after the date on which such
return, report, or notice was last due, under applicable
28 law or under any extension, and after two years before
the date of the filing of the petition[.]

1 as opposed to subparagraph (A), which applies here, is unknown.
2 However, the omission is of no consequence because the relevant
3 language of "debt for" is contained within paragraph (a)(1) and
4 applies to both subparagraphs. Although paragraph (a)(14) uses
5 the language "debt incurred to pay" as opposed to "debt for," we
6 see no reason why Congress would want to treat a creditor under
7 section 523(a)(14) any differently with respect to an award of
8 attorney's fees, if available, than under section 523(a)(1).

9 Cohen is also not limited to cases involving statutorily-
10 based attorney's fees; it applies equally to cases in which fees
11 are provided for by contract. See Redwood Theaters, Inc. v.
12 Davison (In re Davison), 289 B.R. 716, 725 (9th Cir. BAP 2003)
13 (implying that attorney's fees provided for payee in promissory
14 note could have been awarded to creditor if he had been prevailing
15 party in nondischargeability action).

16 Accordingly, we conclude that attorney's fees awarded in
17 connection with a judgment under section 523(a)(14) would be
18 nondischargeable. Likewise, the same is true for an award of
19 costs. We now must determine whether Fry was entitled to recover
20 attorney's fees outside of bankruptcy under Nevada law.

21 **3. Nevada law.**

22 In Nevada, a court may provide for an award of attorney's
23 fees as a cost of litigation under a fee shifting statute or
24 agreement as opposed to an element of damage only if an agreement,
25 statute or rule authorizes such an award. Shuette v. Beazer Homes
26 Holdings Corp., 124 P.3d 530, 547 (Nev. 2005) (citing Sandy Valley
27 Assocs. v. Sky Ranch Estates Owners Ass'n, 35 P.3d 964 (Nev. 2001)
28 (per curiam), receded from on different grounds by Horgan v.

1 Felton, 170 P.3d 982 (Nev. 2007). NEV. REV. STAT §§ 18.010(1) and
2 18.010(4) authorize the award of attorney's fees to the prevailing
3 party when provided for in a written agreement. Fry is entitled
4 to all costs and expenses incurred, including reasonable
5 attorney's fees to be determined by the court, if he is the
6 prevailing party in a collection action on the note.

7 Here, Dinans admitted that the Loan proceeds were used to pay
8 940 and 941 employer payroll taxes to the IRS. They have also
9 never disputed that these taxes would have been nondischargeable
10 under section 523(a)(1) if not paid to the IRS prepetition. In
11 addition, the bankruptcy court imposed a "tracing" requirement and
12 determined that \$17,068.01 was attributable to paying the taxes.¹⁴
13 Therefore, Fry satisfied the elements for a nondischargeability
14 claim under section 523(a)(14). Barton, 321 B.R. at 879; Chrusz,
15 196 B.R. at 224. However, Dinans' defense to Fry's claim was that
16 no amount was nondischargeable because Fry failed to comply with
17 Nevada law on the Notice of Sale, a defense which the bankruptcy
18 court eventually rejected. Thus, in order for Fry to prevail on
19 what was a suit for collection on the Promissory Note, the court
20 had to determine that Fry's Notice of Sale was adequate under
21 Nevada law, which it ultimately determined in the affirmative.
22 Clearly, if Fry had pursued a collection suit in the Nevada state
23 court, he would have been entitled to reasonable attorney's fees
24 and costs.

25 The parties disputed whether Fry was the "prevailing party"
26 per the terms of the Promissory Note. The bankruptcy court made

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28 ¹⁴ We make no determination on whether or not the bankruptcy
court was correct to impose a "tracing" requirement.

1 no finding on this issue. We conclude that Fry is the "prevailing
2 party" under Nevada law because he succeeded on a significant
3 issue in the litigation which achieved some of the benefit he
4 sought in bringing suit. Valley Elec. Ass'n v. Overfield, 106
5 P.3d 1198, 1200 (Nev. 2005). In addition, his judgment was
6 monetary in nature. Id.

7 Therefore, we conclude that under Nevada law Fry was entitled
8 to reasonable attorney's fee and costs, which would also be
9 nondischargeable along with the underlying debt of \$17,068.01.
10 Cohen, 523 U.S. at 223.

11 **4. The attorney's fees award was not reasonable.**

12 In support of Fry's Motion for Attorney's Fees, he included
13 Pope's time records reflecting an itemized list of tasks she or
14 her paralegal undertook in Fry's case, as well as an affidavit
15 from Pope to support the time records. We note that Pope has been
16 practicing law for over 20 years, and she charged Fry a rate of
17 \$140/hour, reduced from her usual rate of \$250/hour. Fry argues
18 on appeal that the bankruptcy court abused its discretion by
19 awarding him only \$2,000 in attorney's fees. In short, Fry
20 contends that even though some of Pope's time was spent pursuing
21 his section 727 claims, \$2,000 does not begin to cover the fees
22 necessarily expended to prove that under Nevada law he was
23 entitled to have the debt determined nondischargeable in some
24 portion.

25 We review de novo the legal standard the bankruptcy court
26 used to determine an award of attorney's fees. Ferland v. Conrad
27 Credit Corp., 244 F.3d 1145, 1147-48 (9th Cir. 2001).

28 The method for determining reasonable attorney's fees in

1 Nevada is not limited to one specific approach, but its analysis
2 must begin with a method¹⁵ rationally designed to calculate a
3 reasonable amount as tempered by reason and fairness. Shuette,
4 124 P.3d at 548-49. Such amount may be based on a lodestar
5 method¹⁶ as a starting point and then adjusted by considering the
6 factors¹⁷ enumerated in Brunzell v. Golden Gate Nat'l Bank, 455
7 P.2d 31, 33 (Nev. 1969). Id. "[W]hichever method the court
8 ultimately uses, the result will prove reasonable as long as the
9 court provides sufficient reasoning and findings in support of its
10 ultimate determination." Id. See also Schouweiler v. Yancey Co.,
11 712 P.2d 786, 790 (Nev. 1985).

12 We are mindful that the bankruptcy court has broad discretion
13 in determining whether to award attorney's fees. However, the
14 bankruptcy court failed to articulate what legal standard it
15 applied in its decision to award Fry only \$2,000 out of the
16 \$55,361.50 he requested. Besides the court's belief that most of
17 Fry's fees were incurred in pursuing his section 727 claims, the

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19 ¹⁵ In Shuette, the Nevada Supreme Court suggests at least two
20 methods: lodestar and contingency fee. 124 P.3d at 549.

21 ¹⁶ "The lodestar approach involves multiplying 'the number of
22 hours reasonably spent on the case by a reasonable hourly rate.'" Shuette, 124 P.3d at 549 n.98 (quoting Herbst v. Humana Health
Ins. of Nev., Inc., 781 P.2d 762, 764 (Nev. 1989)).

23 ¹⁷ The factors include: "(1) the qualities of the advocate:
24 his ability, his training, education, experience, professional
25 standing and skill; (2) the character of the work to be done: its
26 difficulty, its intricacy, its importance, time and skill
27 required, the responsibility imposed and the prominence and
28 character of the parties where they affect the importance of the
litigation; (3) the work actually performed by the lawyer: the
skill, time and attention given to the work; (4) the result:
whether the attorney was successful and what benefits were
derived.'" Brunzell, 455 P.2d at 33 (quoting Schwartz v.
Schwerin, 336 P.2d 144, 146 (Ariz. 1959)).

1 court also based Fry's fee award on the fact that he recovered
2 only 10% of the debt, i.e., \$17,068.01 out of \$165,000. Even if
3 that was the proper standard under Nevada law for determining an
4 attorney's fee award, which is not the case, the bankruptcy court
5 erred in fact; Fry sought to have \$107,001.32 deemed
6 nondischargeable, not \$165,000. The court then apparently took
7 its 10% figure, applied it to the \$17,068.01 recovered, and
8 awarded Fry an attorney's fee of about 10% of the recovery, or
9 \$2,000.

10 In any event, the judgment contains no explanation as to what
11 calculus the bankruptcy court used in setting Fry's fee award
12 based on the \$17,068.01 judgment. Henry Prods. Inc. v. Tarmu, 967
13 P.2d 444, 446 (Nev. 1998) (if a court without explanation reduces
14 documented fees, the failure to state a basis for the reduced fees
15 is arbitrary and an abuse of discretion). Nevada law prohibits
16 such an approach. See Schouweiler, 712 P.2d at 790 (amount of the
17 judgment is not relevant to a reasonable award of attorney's
18 fees). Hence, the bankruptcy court applied an incorrect rule of
19 law in its fee determination; it should have engaged in an
20 analysis of the factors required under Nevada law to determine a
21 reasonable attorney's fee. As a result, the bankruptcy court
22 abused its discretion. Hinkson, 585 F.3d at 1262.

23 Accordingly, we VACATE the bankruptcy court's award of
24 attorney's fees and REMAND this issue for a reasonableness
25 determination in compliance with Nevada law.¹⁸

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27 ¹⁸ On remand, the bankruptcy court is free to consider all
28 appropriate factors in determining how much of the fees Fry
(continued...)

1 **B. The Bankruptcy Court Did Not Abuse Its Discretion When It**
2 **Awarded Fry \$337 In Costs.**

3 Dinans agreed in the Promissory Note to pay all costs and
4 expenses Fry incurred in a collection suit against them. In Fry's
5 Bill of Costs, he requested \$2,366.87 for filing fees, service of
6 the summons and complaint, witness fees, deposition costs, and
7 process server fees. He supported his request with receipts for
8 the expenses and Pope's affidavit. On appeal, Fry contends that
9 the bankruptcy court abused its discretion when it awarded him
10 only \$337 out the \$2,366.87 he requested in costs.

11 Rule 7054(b) provides that the court may allow costs to the
12 prevailing party, except for certain reasons not relevant here.
13 While the national rule uses the term "may," Local Bankruptcy Rule
14 7054-1, which has adopted in full LR 54-1 of the District Court
15 for the District of Nevada, provides that the prevailing party
16 "shall" be entitled to reasonable costs. Thus, an award of costs
17 is mandatory.

18 Here, the bankruptcy court awarded Fry only \$337 in costs
19 because it determined most of the expenses related to his failed
20 section 727 claims. Again, the court did not articulate the legal
21 standard it was applying. However, such error was harmless
22 because Fry has not properly briefed this issue. While Fry
23 presents the costs award as one of the issues on appeal, he
24 provides no argument to support his assertion that the bankruptcy
25

26 ¹⁸(...continued)
27 requested are reasonable. One factor to consider is that Fry
28 stated in his reply brief, and Pope confirmed at oral argument,
that approximately \$34,000 is directly traceable to the
nondischargeability claim.

1 court abused its discretion in its costs award. Issues raised in
2 a brief but not supported by argument are deemed abandoned. Leer
3 v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). Therefore, we will
4 not consider the bankruptcy court's decision on Fry's costs award.
5 Even if we did consider it, we could not conclude on this record
6 that the court abused its discretion.

7 **VI. CONCLUSION**

8 Based on the foregoing reasons, we AFFIRM the bankruptcy
9 court's costs award of \$337. However, we VACATE the \$2,000
10 attorney's fee award and REMAND that issue to the bankruptcy court
11 for further proceedings consistent with this opinion.

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