

DEC 23 2008

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-08-1154-HMoPa
BRANFORD PARTNERS, LLC,	)	Bk. No.	06-12551-KT
Debtor.	)	Adv. No.	07-01137-KT
_____	)		
ALL-TEX, INC.,	)		
Appellant,	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
BRANFORD PARTNERS, LLC,	)		
Appellee.	)		
_____	)		

Argued and Submitted on November 21, 2008  
at Los Angeles, California

Filed - December 23, 2008

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

Honorable Kathleen H. Thompson, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: HOLLOWELL, MONTALI and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Creditor All-Tex, Inc. ("All-Tex") appeals an award of  
2 attorneys' fees to Branford Partners, LLC ("Debtor") who obtained  
3 a dismissal of an adversary proceeding in which All-Tex asserted  
4 equitable liens and specific performance rights stemming from a  
5 contract between them. We AFFIRM the bankruptcy court's order.

#### 6 I. FACTS

7 Debtor filed a chapter 11 bankruptcy petition on December  
8 26, 2006, and continued to operate as the debtor-in-possession.<sup>2</sup>

9 All-Tex asserted a general unsecured claim in the amount of  
10 \$26,288,126.84 arising out of a contract it entered into with  
11 Debtor's predecessor in interest, Sunquest Development, LLC  
12 ("Sunquest").

13 Under the terms of the "Agreement to Sell and Purchase and  
14 Escrow Instructions" (the "All-Tex Contract"), Sunquest agreed to  
15 build an industrial office building on a parcel of real property  
16 ("Property"), transfer title to the finished building to All-Tex  
17 upon completion, and provide All-Tex an easement on adjacent  
18 property. In return, All-Tex agreed to pay Sunquest \$6,800,000  
19 and paid a \$500,000 cash deposit.

20 All-Tex alleges Sunquest and Debtor breached the All-Tex  
21 Contract by failing to construct the building and transfer the  
22 Property to All-Tex, as well as by encumbering the Property with  
23 various liens. All-Tex brought an action against Debtor in state  
24 court alleging breach of contract, fraud, negligent  
25 misrepresentation, breach of the covenant of good faith and fair

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26  
27 <sup>2</sup> Unless specified otherwise, all chapter and code  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
The Federal Rules of Bankruptcy Procedure, 1001-9037, are  
referred to in this Memorandum as Bankruptcy Rules.

1 dealing, and breach of fiduciary duty. The state court action  
2 was stayed as a result of the bankruptcy filing.

3 The Debtor filed an objection to All-Tex's proof of claim.  
4 All-Tex, in turn, filed a complaint and initiated an adversary  
5 proceeding against the Debtor to determine its interest in the  
6 Property (the "Adversary Proceeding"). It also, after the claims  
7 bar date, filed an amended proof of claim changing its unsecured  
8 claim to a secured claim based on an assertion of lien rights  
9 against the Property. All-Tex then amended its complaint,  
10 titling it the "Objection to Claim and Amended Complaint to  
11 Determine Extent, Priority and Validity of Lien and Interest of  
12 All-Tex, Inc. in Property" ("Amended Complaint").

13 The Amended Complaint asserted seven claims for relief. The  
14 first through fourth claims were for a determination that  
15 Debtor's interest in the Property on the petition date was  
16 subject to the rights of All-Tex which allegedly held a vendee's  
17 lien, equitable liens, and specific performance rights. The  
18 fifth through seventh claims were against other entities holding  
19 liens against the Property and alleged that those interests were  
20 subject to All-Tex's equitable liens. All-Tex based its claims  
21 in the Amended Complaint on the All-Tex Contract.

22 The Debtor filed a Motion for Dismissal of Complaint  
23 Pursuant to Bankruptcy Rule 7012(b)(6) ("Motion to Dismiss") in  
24 the Adversary Proceeding (which was treated as a motion for  
25 summary judgment) and a Motion for Partial Summary Judgment  
26 regarding its objection to All-Tex's amended proof of claim  
27 ("Claim Objection").

28

1           The bankruptcy court heard both motions together. On  
2 January 3, 2008, the bankruptcy court ruled that All-Tex  
3 presented no evidence to show that a hypothetical bona fide  
4 purchaser would have had constructive or inquiry notice of its  
5 alleged interests sufficient to survive the avoidance powers of  
6 the Debtor, and, that the Debtor could, therefore, defeat or  
7 avoid each of the alleged equitable interests, liens, and  
8 remedies asserted by All-Tex in connection with the Property. It  
9 also denied All-Tex's specific performance rights. The  
10 bankruptcy court granted Debtor's partial summary judgment motion  
11 in the Claim Objection and disallowed All-Tex's amended secured  
12 claim. All-Tex appealed to this Panel. The Panel affirmed the  
13 bankruptcy court's orders in an unpublished decision on October  
14 24, 2008 (BAP Nos. 08-1021 & 1044).

15           On January 23, 2008, Debtor filed a Motion for Order  
16 Directing Payment of Attorneys' Fees by All-Tex, Inc. ("Motion  
17 for Attorneys' Fees"). All-Tex timely filed an opposition. The  
18 bankruptcy court heard the matter, allowed supplemental briefs by  
19 both parties, and entered a Memorandum and Order Granting  
20 Debtor's Motion for Order Directing Payment of Attorneys' Fees by  
21 All-Tex, Inc. ("Memorandum Decision").

22           The bankruptcy court awarded Debtor attorneys' fees;  
23 however, it made deductions for matters not specific to the  
24 Adversary Proceeding or related issues in the Claim Objection,  
25 excessive conferencing with fellow litigants and reviewing  
26 pleadings of other parties. In addition, it reduced the balance  
27 by 25% because of the narrowness of its ruling in favor of the  
28 Debtor. The total "write down" of Debtor's attorneys' fees was

1 \$38,832.50 leaving Debtor with an award in the amount of  
2 \$69,369.50. All-Tex timely appealed.

## 3 **II. JURISDICTION**

4 As a threshold matter, we must determine whether the  
5 bankruptcy court had jurisdiction to adjudicate the fee issue and  
6 whether we, in turn, have jurisdiction to review the order on  
7 appeal. See Krasnoff v. Marshack (In re Gen. Carriers Corp.),  
8 258 B.R. 181, 188-89 (9th Cir. BAP 2001). The bankruptcy court  
9 had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2). The  
10 bankruptcy court retained jurisdiction to award costs and  
11 attorneys' fees even after the underlying matter was appealed.  
12 Masalosaló v. Stonewall Ins. Co., 718 F.2d 955, 957 (9th Cir.  
13 1983) (citing White v. N.H. Dept. Of Employment Sec., 455 U.S.  
14 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)); Budinich v. Becton  
15 Dickinson & Co., 486 U.S. 196, 199-200, 108 S.Ct. 1717, 100  
16 L.Ed.2d 178 (1988).

17 An order awarding fees is final when the amount of the fee  
18 is determined. Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614,  
19 617 (9th Cir. 1993). Therefore, we have jurisdiction under 28  
20 U.S.C. § 158.

## 21 **III. ISSUE**

22 Did the bankruptcy court err in awarding attorneys' fees to  
23 the Debtor?

## 24 **IV. STANDARDS OF REVIEW**

25 A bankruptcy court's determination of attorneys' fees will  
26 not be disturbed unless the bankruptcy court abused its  
27 discretion or erroneously applied the law. In re Strand, 375  
28 F.3d 854, 857 (9th Cir. 2004). A bankruptcy court abuses its

1 discretion if it bases its decision on an erroneous view of the  
2 law or clearly erroneous factual findings. Cooter & Gell v.  
3 Hartmarx Corp., 496 U.S. 384, 405 (1990). We review conclusions  
4 of law and issues of statutory interpretation de novo. Vill.  
5 Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410  
6 (9th Cir. BAP 1999) (citations omitted).<sup>3</sup>

## 7 **V. DISCUSSION**

8 All-Tex's main arguments as to why the award of attorneys'  
9 fees was made in error are that: (1) Debtor waived its right to  
10 attorneys' fees; (2) attorneys' fees cannot be allowed as  
11 recoverable costs; (3) Debtor cannot recover attorneys' fees  
12 under the All-Tex Contract; and, (4) the Debtor was not the  
13 prevailing party.<sup>4</sup>

### 14 A. Debtor Did Not Waive its Right to Recover Attorneys' Fees.

15 The Debtor's substantive right to attorneys' fees does not  
16 come from either the Bankruptcy Rules or the Code; rather, a  
17 prevailing party may recover attorneys' fees under state law if  
18 state law governs the substantive issues raised in the  
19 proceeding. Ford v. Baroff (In re Baroff), 105 F.3d 439, 441  
20 (9th Cir. 1997). Because state law "necessarily controls an  
21 action on a contract," a party in a contract action is entitled  
22

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23 <sup>3</sup> Neither party fully complied with Bankruptcy Rules 8009,  
24 8010 and the Rules of the United States Bankruptcy Appellate  
25 Panel of the Ninth Circuit ("9th Cir. BAP Rules") 8006-1,  
26 8009(b)-1, 8010(a)-1. In particular, the transcript of the  
27 February 19, 2008 hearing on Debtor's Motion for Attorneys' Fees  
was not included in the record (or available on the bankruptcy  
case docket). This limits our review of the bankruptcy court's  
reasoning to the Memorandum Decision.

28 <sup>4</sup> Neither party challenges the specific deductions in  
attorneys' fees made by the bankruptcy court.

1 to an award of fees if the contract provides for an award and  
2 state law authorizes fee shifting agreements. Id.; Johnson v.  
3 Righetti (In re Johnson), 756 F.2d 738, 741 (9th Cir. 1997) (a  
4 prevailing party to an adversary proceeding in bankruptcy court  
5 may be awarded attorneys' fees if attorneys' fees would have been  
6 awarded under substantive state law and state law was applied in  
7 the court's determination); see also Traveler's Cas. & Sur. Co.  
8 Of Am. v. Pac. Gas & Elec., 549 U.S. 443, 127 S.Ct. 1199, 1203-  
9 04, 167 L.Ed.2d 178 (2007) ("Travelers").

10 California law controls the All-Tex Contract and was applied  
11 by the bankruptcy court in determining the issues presented in  
12 the Adversary Proceeding. Yet, All-Tex asserts Debtor cannot use  
13 California attorneys' fee statutes as a basis for recovery, in  
14 part because it did not comply with California Rules of Civil  
15 Procedure in requesting attorneys' fees.

16 Even though California law applies to determine if Debtor  
17 has a right to attorneys' fees as costs, the Debtor was not  
18 obligated to comply with state court rules in its application for  
19 fees. Debtor was required to comply with applicable bankruptcy  
20 rules in requesting its attorneys' fees because the action on the  
21 All-Tex Contract took place in the bankruptcy court. Bankruptcy  
22 Rule 1001.<sup>5</sup> The rules applicable to the Debtor's Motion for  
23 Attorneys' Fees were, therefore, the Bankruptcy Rules and the  
24

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25  
26 <sup>5</sup> The Bankruptcy Rules apply to bankruptcy cases "except in  
27 those limited instances in which the rules specifically  
28 incorporate state procedural law" such as Bankruptcy Rule 7069  
allowing execution under state law procedures. 9 Alan N. Resnick  
& Henry J. Sommer, COLLIERS ON BANKRUPTCY § 1001.01 (15th ed.  
2008).

1 Local Bankruptcy Rules for the Central District of California  
2 ("Local Rules").

3 1. Local Rule 7054-1

4 Bankruptcy Rule 7054(b) allows a prevailing party its costs  
5 incurred in an adversary proceeding in certain circumstances.  
6 Local Rule 7054-1 specifically provides attorneys' fees as part  
7 of those costs<sup>6</sup>:

8 Local Rule 7054-1:

9 \* \* \* \*

10 (f) Motion for Attorneys' Fees

11 If not previously determined at trial or other hearing,  
12 any motion for attorneys' fees where such fees may be  
13 awarded shall be served and filed within 30 days after  
14 the entry of judgment or other final order, unless  
15 otherwise ordered by the court. Such motions and their  
16 disposition shall be governed by Local Bankruptcy Rule  
17 9013-1.

18 Debtor filed the Motion for Attorneys' Fees within thirty  
19 days of the bankruptcy court's order in the Adversary Proceeding  
20 and Claim Objection. However, All-Tex asserts that Debtor failed  
21 to comply with Local Rule 7054-1 because it did not file a bill  
22 of costs.

23 The requirement to file a bill of costs is contained in a  
24 separate section of Local Rule 7054-1, section (b), and refers to  
25 demonstrating that certain specific items (such as filing fees,  
26

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27 <sup>6</sup> All-Tex makes several statements in its briefs such as:  
28 "attorneys' fees are not costs under federal law," "under Rule  
29 7054 a litigant cannot claim attorneys' fees as costs," and  
30 "under California law, 'costs' are not attorneys' fees." These  
31 are misstatements of the law. As explained in this decision,  
32 attorneys' fees are allowable costs under the Bankruptcy Rules  
33 and Local Rules, and California cost statutes provide that  
34 attorneys' fees are recoverable litigation costs under certain  
35 circumstances.



1 clerk's fees, transcript fees, deposition costs, etc.) which may  
2 be taxed as costs were necessarily incurred. Under the  
3 applicable section of Local Rule 7054-1, section (f), a bill of  
4 costs is not required as part of an application for attorneys'  
5 fees.

6 2. Bankruptcy Rules 7008 and 7009

7 All-Tex insists Debtor was required to plead for attorneys'  
8 fees under Bankruptcy Rules 7008 and 7009. Under Bankruptcy Rule  
9 7008(b):

10 A request for an award of attorney's fees shall be  
11 pleaded as a claim in a complaint, cross-claim, third-  
12 party complaint, answer, or reply as may be  
appropriate.

13 All-Tex initiated the Adversary Proceeding against Debtor.  
14 Debtor did not file an answer to the Amended Complaint; it filed  
15 a Motion to Dismiss. The Motion to Dismiss is allowed under  
16 Bankruptcy Rule 7012 (making Federal Rule of Civil Procedure  
17 ("Fed. R. Civ. P.") 12 applicable in adversary proceedings).  
18 Fed. R. Civ. P. 12(b) allows a defendant to assert the defense of  
19 "failure to state a claim upon which relief can be granted" by  
20 motion. Bankruptcy Rule 7012 does not require that attorneys'  
21 fees be specially pled.

22 Courts have not barred recovery of attorneys' fees when  
23 requested by post trial motion. Merced Prod. Credit Ass'n v.  
24 Sparkman (In re Sparkman), 703 F.2d 1097, 1100 (9th Cir. 1983) A  
25 post trial motion for costs is the "preferred method" for seeking  
26 attorneys' fees and costs. Id. This method is a "common and  
27 accepted practice." First Card v. Hunt (In re Hunt), 238 F.3d  
28 1098, 1102 n.4 (9th Cir. 2001); see also Ganey v. Doran, 191

1 Cal.App.3d 901, 911-12 (1987) (trial court did not err in  
2 awarding attorneys' fees that were not pled in complaint); First  
3 Chicago FCC Nat'l Bank v. Willett (In re Willett), 125 B.R. 607  
4 (Bankr. S.D. Cal. 1991) (awarding fees that were requested and  
5 proved after dismissal of creditor's complaint).

6 Bankruptcy Rule 7009 requires that items of special damages  
7 be "specifically stated." It is inapplicable here because  
8 statutory fees are not damages that must be specially pled. In  
9 re Sparkman, 703 F.2d at 1100 (citing Beneficial Standard  
10 Properties, Inc. v. Scharps, 67 Cal.App.3d 227, 232 n. 3 (1977)).

11 All-Tex argues that Debtor was required to plead for  
12 attorneys' fees under Bankruptcy Rules 7008(b) and 7009 so that  
13 All-Tex could have "briefed the fact that Debtor cannot enforce  
14 the All-Tex Contract because of its own breaches thereof."  
15 However, All-Tex made this argument to the bankruptcy court in  
16 its Opposition to Debtor's Motion for Order Directing Payment of  
17 Attorneys' Fees and the Supplemental Brief of All-Tex, Inc. With  
18 Respect to Debtor's Motion for Attorneys' Fees. Moreover, Debtor  
19 included in its Motion for Attorneys' Fees a complete breakdown  
20 of fees incurred to which All-Tex made specific objections.

21 We find no error in the bankruptcy court's ruling that the  
22 request for attorneys' fees was governed by Local Rule 7054-1(f)  
23 and had not been waived by Debtor's non-compliance with  
24 Bankruptcy Rules 7008 and 7009.

25 B. Under California Law, Costs Can Include Attorneys' Fees.

26 The Cal. Code Civ. Proc. provides a party the right to  
27 recover costs of an action or proceeding if it prevails. CAL.  
28 CODE CIV. PROC. § 1032 ("Except as otherwise expressly provided

1 by statute, a prevailing party is entitled as a matter of right  
2 to recover costs in any action or proceeding.”). Recoverable  
3 costs may include attorneys’ fees if authorized by contract or  
4 law:

5 (a) The following items are allowable as costs under  
6 Section 1032:

\* \* \* \*

7 (10) Attorney fees, when authorized by any of the  
8 following:

(A) Contract.

(B) Statute.

(C) Law.

9  
10 CAL. CODE CIV. PROC. § 1033.5.

11 Additionally, Cal. Civ. Code § 1717 provides a basis for a  
12 party to recover attorneys’ fees incurred in litigation of a  
13 contract claim. Sec. Nat’l Guar., Inc. v. Shores LLC (In re Sec.  
14 Nat’l Guar.), 2007 WL 2462124, \*5 (Bankr. N.D. Cal. 2007). It  
15 provides:

16 (a) In any action on a contract, where the contract  
17 specifically provides that attorney’s fees and costs,  
18 which are incurred to enforce that contract, shall be  
19 awarded either to one of the parties or to the  
20 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.

21 CAL. CIV. CODE § 1717. Attorneys’ fees awarded under § 1717 are  
22 specifically allowed as a recoverable cost under Cal. Code Civ.  
23 Proc. §§ 1032 and 1033.5. CAL. CODE CIV. PROC. § 1033.5(c)(5).

24 Debtor sought attorneys’ fees under the provisions of the  
25 All-Tex Contract. The All-Tex Contract reads:

26 23. Should either party hereto institute any action or  
27 proceeding in court or through arbitration to enforce  
28 any provision hereof or for damages by reason of any  
alleged breach of any provision of this Agreement or  
for any other remedy, the prevailing party shall be  
entitled to receive from the losing party all of its

1 costs and expenses, including, without limitation,  
2 reasonable attorneys' fees and all court and/or  
3 arbitration costs, costs of appeal and disbursements  
4 actually and reasonably incurred in connection with  
5 said proceeding.

6 Because the Adversary Proceeding involved the All-Tex  
7 Contract and the All-Tex Contract authorizes the recovery of  
8 attorneys' fees, the Debtor could seek attorneys' fees as  
9 recoverable costs under Cal. Civ. Code § 1717 and Cal. Code Civ.  
10 Proc. §§ 1032 and 1033.5.<sup>7</sup> Redwood Theatres, Inc. v. Davison (In  
11 re Davison), 289 B.R. 716, 724 (9th Cir. 2003); Santisas v.  
12 Goodin, 17 Cal.4th 599, 612 (1998) (a defendant in whose favor a  
13 dismissal has been entered is entitled to recover costs including  
14 attorneys' fees).

15 C. Cal. Civ. Code § 1717 Applies as a Basis for Debtor's  
16 Recovery of Attorneys' Fees.

17 All-Tex's primary argument against the award of attorneys'  
18 fees is that Debtor breached the All-Tex Contract and, therefore,  
19 may not enforce the attorneys' fees provision of the contract  
20 against All-Tex. Because of the alleged breach, All-Tex argues,  
21 Cal. Civ. Code § 1717 is "irrelevant." All-Tex asserts: "NOTHING  
22 in Section 1717 gives the breaching party a right to legal fees  
23 from the non-breaching side without honoring its obligations to  
24 the non-breaching party." (Emphasis in original).

25 All-Tex emphatically states as fact that Debtor breached the  
26 All-Tex Contract. However, there has not been a judicial  
27 determination about whether the All-Tex Contract was breached,  
28

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<sup>7</sup> At oral argument, counsel for Debtor clarified that it sought attorneys' fees under Cal. Civ. Code § 1717 as recoverable costs under Cal. Code Civ. Proc. § 1033.5.

1 and if so, by which party, or with what damages. It was not the  
2 subject of the Adversary Proceeding or the Claims Objection.  
3 This, however, does not mean that it must be adjudicated prior to  
4 invoking either the attorneys' fee provision of the All-Tex  
5 Contract or Cal. Civ. Code § 1717.

6 Even if the Debtor had breached the All-Tex Contract, we  
7 have found no cases that hold attorneys' fees are unrecoverable  
8 by a breaching but prevailing party under Cal. Civ. Code § 1717.  
9 For example, in In re Sparkman, both parties breached a financial  
10 forbearance agreement and attorneys' fees were awarded to the  
11 debtor defendant. 703 F.2d 1097. In In re Sec. Nat'l Guar., the  
12 debtor defaulted on a loan but was still awarded attorneys' fees  
13 as the prevailing party. 2007 WL 2462124; see e.g., In re  
14 Johnson, 756 F.2d 738 (breaching party to a contract was awarded  
15 attorneys' fees under Cal. Civ. Code § 1717; the district court  
16 reversed because the bankruptcy matter was not sufficiently an  
17 action "on the contract" - not because the prevailing party was  
18 in breach.)

19 In this case, All-Tex's pre-petition claim was directly  
20 dependent on the All-Tex Contract, the interpretation of which  
21 was a matter of California and bankruptcy law. The question is  
22 not who was in breach of the All-Tex Contract, but whether the  
23 claims were sufficiently based upon the All-Tex Contract to  
24 support an award of attorneys' fees under Cal. Civ. Code § 1717.  
25 See Next Factors, Inc. v. Aural, Inc. (In re Aural), 2006 WL  
26 2130903 (N.D. Cal. 2006). An action "seeking a declaration of  
27 rights based on an agreement constitutes an action on the  
28

1 contract" for purposes of Cal. Civ. Code § 1717. In re Sec.  
2 Nat'l Guar., 2007 WL 2462124 at \*6 (citations omitted).

3 At oral argument, All-Tex confirmed that its claims were  
4 based on the All-Tex Contract. But it argues that only it, as  
5 the alleged non-breaching party, has a right to recover  
6 attorneys' fees under § 1717. However, § 1717 is intended to  
7 provide for a mutual remedy when a contract makes the recovery of  
8 attorneys' fees available to one party. PLCM Group, Inc. v.  
9 Drexler, 22 Cal.4th 1084, 1090-91 (2000); Santisas v. Goodin, 17  
10 Cal.4th at 610.

11 The All-Tex Contract provides the parties' remedies in the  
12 event either party breaches the All-Tex Contract:

13 19. Remedies

14 A. In the event that seller shall fail to consummate  
15 the transaction contemplated by this Agreement due to a  
16 default by seller (other than the failure of seller to  
17 (i) acquire the adjoining city property within a time  
18 which will allow seller to perform its obligations  
19 under this agreement or (ii) record a parcel map or  
20 tract map establishing the land as a legal parcel),  
21 purchaser as its sole and exclusive remedy, may either  
22 (1) terminate this agreement and receive a refund of  
23 the deposit and pursue seller for actual damages;  
24 provided, however, in no event shall purchaser be  
entitled to a recovery or claim against seller for  
actual damages in excess of an amount equal to the  
amount of one hundred thousand dollars (\$100,000) and  
seller shall not be liable to purchaser for any  
punitive, speculative or consequential damages or (2)  
pursue seller for specific performance. In no event  
shall this section 19.A. have any application to or  
limit purchasers rights against seller in connection  
with Section 23 of this Agreement [the provision for  
attorneys' fees].

25 Section 19(B) is similar, offering All-Tex a remedy if Debtor  
26 failed to acquire adjoining property or to record the Property.

27 Section 19(C) provides Debtor remedies if All-Tex breaches.

28 These remedy sections specifically allow for the party seeking

1 damages after a breach to invoke the attorneys' fee provision in  
2 Section 23.

3 Under the All-Tex Contract, after any breach by Debtor, All-  
4 Tex is entitled to its remedies under Section 19. All-Tex sought  
5 damages by filing a proof of claim in the bankruptcy case and by  
6 asserting it had equitable liens and specific performance rights  
7 that attached to any proceeds of the Property (sold during the  
8 bankruptcy case) to allow it to be paid ahead of other creditors.  
9 All-Tex could have recovered attorneys' fees under the All-Tex  
10 Contract and Cal. Civ. Code § 1717 if it had prevailed.

11 Because Cal. Civ. Code § 1717 provides mutuality, its effect  
12 is to allow recovery of attorneys' fees by whichever contracting  
13 party prevails, "whether or not he or she is the party specified  
14 in the contract or not." Santisas v. Goodin, 17 Cal.4th at 611.

15 We find no error in the bankruptcy court's application of  
16 Cal. Civ. Code § 1717 and Cal. Code Civ. Proc. §§ 1032 and 1033.5  
17 in its determination that Debtor could recover attorneys' fees as  
18 costs incurred in the litigation of the Adversary Proceeding.

19 D. Debtor Is the Prevailing Party.

20 All-Tex argues "the Debtor has not obtained any victory on  
21 any contract claim or under the All-Tex Contract" because the  
22 "merits" of the contract were not adjudicated. All-Tex  
23 conflates: (1) cases where a court analyzes whether attorneys'  
24 fees involved in certain aspects of contract litigation are  
25 recoverable under Cal. Civ. Code § 1717, particularly when the  
26 action combines tort claims with contract causes of action; and,  
27 (2) cases where contract litigation was a bankruptcy matter and,  
28 while it involved a contract, was resolved by application of

1 bankruptcy law rather than substantive state law (such as  
2 dischargeability actions).

3       We addressed the former instance in Section C above, finding  
4 that Cal. Civ. Code § 1717 provided a basis for the Debtor to  
5 recover attorneys' fees. In the latter instance, All-Tex is  
6 essentially making a pre-Travelers argument that only fees  
7 related to state law contract issues and not bankruptcy issues  
8 may be recovered. 549 U.S. 443 (2007). Prior to Travelers, the  
9 Ninth Circuit held that contract litigation resolved by  
10 application of bankruptcy law rather than state law was not  
11 sufficiently "on a contract" to allow recovery of attorneys' fees  
12 under Cal. Civ. Code § 1717. Fobian v. W. Farm Credit Bank (In  
13 re Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991); In re Johnson,  
14 756 F.2d 738, 740-41 (9th Cir. 1985). This dichotomy has been  
15 eliminated by Travelers.

16       Travelers overruled the Fobian rule that prohibited awards  
17 of attorneys' fees when only issues of federal bankruptcy law  
18 were litigated in a case involving a contract. It makes "clear  
19 that contract based fees incurred in the course of litigating  
20 issues of federal bankruptcy law may be awarded pursuant to state  
21 law." Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369  
22 B.R. 506, 511 (9th Cir. 2007).

23       Because we have found the bankruptcy court did not err in  
24 applying Cal. Civ. Code § 1717, Cal. Code Civ. Proc. §§ 1032 and  
25 1033.5, the only remaining determination is whether Debtor was  
26 the prevailing party under California law. The "party prevailing  
27 on the contract" is defined as the "party who recovered a greater  
28 relief in the action on the contract." Cal. Civ. Code § 1717(b);



1 In re Sec. Nat'l Guar., 2007 WL 2462124 at \*5. "[W]hen the  
2 decision on a litigated contract claim is purely good news for  
3 one party and bad news for the other--the Courts of Appeal have  
4 recognized that a trial court has no discretion to deny attorney  
5 fees to the successful litigant." Otay River Constructors v. San  
6 Diego Expressway, 158 Cal.App.4th 796, 806 (2008) (citations  
7 omitted) (emphasis added).

8 The bankruptcy court dismissed all claims asserted in All-  
9 Tex's Amended Complaint and granted partial summary judgment for  
10 the Debtor on the Claim Objection. Debtor successfully defended  
11 against All-Tex's claims that it held an enforceable equitable  
12 lien or specific performance rights that would allow it's damages  
13 claim to be paid as a secured claim, superior to certain other  
14 creditors. A defendant in whose favor a dismissal is entered is  
15 a prevailing party. CAL. CODE CIV. PROC. § 1032(a)(4); Wakefield  
16 v. Bohlin, 145 Cal.App.4th 963, 972-73 (2007). Therefore, the  
17 bankruptcy court correctly decided that Debtor was the prevailing  
18 party entitled to attorneys' fees.

## 19 VI. CONCLUSION

20 The bankruptcy court considered all arguments and relevant  
21 evidence. The bankruptcy court correctly applied relevant  
22 procedural rules and California law in deciding the Debtor was  
23 entitled to an award of attorneys' fees as costs because it  
24 prevailed in the Adversary Proceeding. It made no error in its  
25 application of law. The order granting attorneys' fees is

26 **AFFIRMED.**

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