

JAN 06 2014

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | |
|-------------------------|---|--------------------------|
| In re: |) | BAP No. CC-12-1516-DKiTa |
| |) | |
| SEYED SHAHRAM HOSSEINI, |) | Bk. No. SV 10-66228-WA |
| |) | |
| Debtor. |) | Adv. No. SV 10-01385-WA |
| |) | |
| SEYED SHAHRAM HOSSEINI, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | O P I N I O N |
| |) | |
| KEY BANK, N.A., |) | |
| |) | |
| Appellee. |) | |
| |) | |

Argued and Submitted
at Pasadena, California on November 21, 2013

Filed - December 19, 2013
Ordered Published - January 6, 2014

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

Hon. William V. Altenberger, Bankruptcy Judge, Presiding.

Appearances: Denise M. Fitzpatrick, Esq. for Appellant, Seyed Shahram Hosseini; and Holly J. Nolan, Esq. for Appellee, Key Bank, N.A.

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

1 DUNN, Bankruptcy Judge:
2

3 The debtor, Seyed Shahram Hosseini, appeals the bankruptcy
4 court's order 1) denying his motion for attorney's fees and 2)
5 allowing only costs for service of process requested in his bill
6 of costs.¹ We AFFIRM.

7 **FACTS**

8 Prepetition, the debtor obtained a total of \$280,046.34 in
9 student loans ("student loan debt") from Key Bank, N.A. ("Key
10 Bank") to fund his medical school education. Despite several
11 attempts, he was unable to pass the medical licensing exam. The
12 debtor did not become a physician, as he had hoped, but instead
13 became a night security guard earning only \$13.50 per hour. He
14 also was beset with various physical and mental ailments,
15 including diabetes and depression.

16 The debtor filed a chapter 7 bankruptcy petition on May 24,
17 2010. He initiated an adversary proceeding to discharge the
18 student loan debt under § 523(a)(8). Two years after Key Bank
19 filed its answer in the adversary proceeding, the bankruptcy
20 court held a trial. It granted judgment in the debtor's favor,
21 discharging his entire student loan debt to Key Bank ("Discharge
22 Order").

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

The Local Bankruptcy Rules for the United States Bankruptcy
Court for the Central District of California are referred to as
"LBR."

1 Shortly after the bankruptcy court entered the Discharge
2 Order, the debtor filed a bill of costs ("Cost Bill") seeking a
3 total of \$4,960.39 in expenses incurred by his attorney, Denise
4 Fitzpatrick, in the adversary proceeding.² Along with the Cost
5 Bill, he submitted a declaration by Ms. Fitzpatrick ("Cost Bill
6 Declaration"), which included an itemization of each cost sought
7 to be recovered by him ("Cost Bill Itemization").

8 According to the Cost Bill Itemization, the debtor sought
9 \$101.20 for copying and printing (mostly for documents served
10 electronically), \$20.90 for faxing (all for evidentiary documents
11 from the debtor to Ms. Fitzpatrick), \$107.74 for "service of
12 process" (postage for service of summons, status reports and
13 other documents mailed by Ms. Fitzpatrick), and \$4,730.55 for
14 miscellaneous costs (consisting of messenger service fees, online
15 software purchases, exhibit preparation costs, transportation
16 costs for Ms. Fitzpatrick's meetings with co-counsel and/or the
17 debtor, "research and document retrieval" costs, phone charges
18 for a status conference through Court Call, a \$2,500 "consultant
19 fee" to Charles Murray³ ("Murray consultation fee"), and a \$500
20

21 ² The debtor initially sought \$6,210.39 in costs.

22 ³ Ms. Fitzpatrick employed Mr. Murray as a "consultant" to
23 help her during trial. She filed a notice of association of
24 counsel on July 17, 2012, indicating that Mr. Murray was co-
25 counsel in the adversary proceeding. According to Ms.
26 Fitzpatrick, Mr. Murray "did the oral arguments" at trial.

26 The bankruptcy court determined that Mr. Murray was not a
27 consultant but an attorney as he "[had] tried the case." Tr. of
28 September 10, 2012 Hr'g, 29:4. The bankruptcy court therefore
found that the \$2,500 "consultant fee" for Mr. Murray actually

(continued...)

1 fee to Hector Vega for "[consultation] and appearance - necessary
2 to obtain trial continuance and prevent dismissal").⁴

3 The debtor also filed a motion for allowance of attorney's
4 fees ("Attorney Fee Motion"), seeking a total of \$110,701.50 "for
5 reasonable and necessary fees incurred [by Ms. Fitzpatrick] in
6 [the adversary proceeding]."⁵

7 In support of the Attorney Fee Motion, the debtor relied on
8 a provision ("fee provision") in the promissory note for the
9 student loans ("promissory note"), which he claimed authorized
10 him to seek attorney's fees as the prevailing party in the
11 adversary proceeding.⁶ The fee provision stated:

12 _____
13 ³(...continued)
14 was an attorney's fee to be included in the Attorney Fee Motion.

15 ⁴ Ms. Fitzpatrick failed to appear at the trial set for
16 April 25, 2012. She had Mr. Vega specially appear to represent
17 the debtor in her stead. It seems that the \$500 fee to Mr. Vega
18 was for his special appearance at the April 25, 2012 hearing.

19 ⁵ In her declaration filed in support of the Attorney Fee
20 Motion ("Attorney Fee Declaration"), Ms. Fitzpatrick claimed that
21 she spent a total of 316.29 hours litigating the adversary
22 proceeding. She attached to her declaration an "attorney time
23 log" that described the various tasks she performed, the time
24 spent on each task and the amount due.

25 ⁶ The debtor also referenced LBR 7054-1(g)(1), which allows
26 a prevailing party to file a motion for an award of attorney's
27 fees where such fees may be awarded, within 30 days after entry
28 of judgment.

LBR 7054-1(g) provides:

- 29 (1) If not previously determined at trial or other hearing,
30 a party seeking an award of attorneys' fees where such
31 fees may be awarded must file and serve a motion not
32 later than 30 days after the entry of judgment or other
33 final order, unless otherwise ordered by the court.

(continued...)

1 When and as permitted by applicable law, I [the
2 borrower] agree to pay your [the lender] reasonable
3 amounts, including reasonable attorney's fees for any
4 attorney who is not your regularly salaried employee and
court and other collection costs, that you incur in
enforcing the terms of the [promissory] Note if I am in
default.

5 He further relied on California Civil Code ("Civil Code")
6 § 1717, arguing that Civil Code § 1717 reinforced the fee
7 provision through reciprocity.⁷ According to the debtor, Civil
8 Code § 1717 "requires payment of attorney fees to prevailing
9

10 ⁶(...continued)

11 (2) The requirements of LBR 9013-1 through LBR 9013-4 apply
12 to a motion for attorneys' fees under this rule.

13 ⁷ Civil Code § 1717 provides, in relevant part:

14 (a) In any action on a contract, where the contract
15 specifically provides that attorney's fees and costs,
16 which are incurred to enforce that contract, shall be
17 awarded either to one of the parties or to the
18 prevailing party, then the party who is determined to
19 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.

20 Where a contract provides for attorney's fees, as set
21 forth above, that provision shall be construed as
22 applying to the entire contract, unless each party was
23 represented by counsel in the negotiation and execution
of the contract, and the fact of that representation is
specified in the contract.

24 Reasonable attorney's fees shall be fixed by the court,
25 and shall be an element of the costs of suit.

26 Attorney's fees provided for by this section shall not
27 be subject to waiver by the parties to any contract
28 which is entered into after the effective date of this
section. Any provision in any such contract which
provides for a waiver of attorney's fees is void.

1 parties when attorney fees are afforded to any contracting
2 party."

3 Key Bank opposed the Cost Bill, contending that the debtor
4 could not recover certain costs because they were not allowed
5 under LBR 7054-1. Specifically, it opposed the debtor's request
6 for recovery of costs for every copy ever made in the adversary
7 proceeding because LBR 7054-1 allowed recovery of costs of copies
8 of documents admitted into evidence only if the original
9 documents were not available. It further opposed recovery for
10 postage, Court Call charges, fax charges, messenger and delivery
11 charges, software costs, transportation costs, PACER research
12 charges and the Murray consultation fee because LBR 7054-1 did
13 not include such expenses as recoverable costs.

14 Key Bank also opposed the Attorney Fee Motion, arguing that
15 there was no statutory basis for an award of attorney's fees
16 under § 523(a)(8) as required under the American Rule.

17 Key Bank also contended that the fee provision only applied
18 to actions seeking to enforce the terms of the promissory note.
19 Here, the debtor had initiated the adversary proceeding to
20 discharge his student loan debt under § 523(a)(8), not to enforce
21 the promissory note's terms. The debtor therefore could not seek
22 attorney's fees because he prevailed on a claim to relieve
23 himself from his debts under federal law, not on a Key Bank claim
24 to recover following a default under the promissory note.

25 Key Bank further asserted that Civil Code § 1717 did not
26 apply because the promissory note contained a provision stating
27 that Ohio law, not California law, governed the prevailing
28 party's recovery of attorney's fees ("governing law provision").

1 Specifically, the governing law provision stated:

2 I understand and agree that (i) you are located in
3 Ohio, (ii) that this Note will be entered into in Ohio
4 and (iii) that your decision on whether to lend me
5 money will be made in Ohio. CONSEQUENTLY, THE
6 PROVISIONS OF THIS NOTE WILL BE GOVERNED BY FEDERAL
7 LAWS AND THE LAWS OF THE STATE OF OHIO, WITHOUT REGARD
8 TO CONFLICT OF LAW RULES. I agree that any suit I
bring against you (or against any subsequent holder of
this Note) must be brought in a court of competent
jurisdiction in the county in which you maintain your
(or the county in which the subsequent holder maintains
its) principal place of business.

9 On September 10, 2012, the bankruptcy court held a hearing
10 on the Cost Bill and the Attorney Fee Motion.

11 After hearing extensive argument from counsel, the
12 bankruptcy court first addressed the Cost Bill. The bankruptcy
13 court agreed with Key Bank that LBR 7054-1 allowed for the
14 recovery of filing fees and certain of the service of process
15 fees, but not for the other fees requested by the debtor.

16 The bankruptcy court then turned to the Attorney Fee Motion.
17 It began by recognizing that, under the American Rule, a
18 prevailing party may not recover attorney's fees unless there was
19 a statute or a contract authorizing such recovery. The
20 bankruptcy court acknowledged that the fee provision allowed Key
21 Bank to recover any attorney's fees incurred in enforcing the
22 terms of the promissory note if the debtor defaulted. It also
23 acknowledged that Civil Code § 1717 provided that, in any action
24 on a contract where the contract specifically provided for the
25 recovery of attorney's fees incurred by the prevailing party to
26 enforce the contract, the prevailing party was entitled to
27 recover reasonable attorney's fees. The bankruptcy court noted
28 that Key Bank did not dispute that if it could recover attorney's

1 fees as the prevailing party, the debtor also could recover
2 attorney's fees if he were the prevailing party.⁸

3 The bankruptcy court ultimately decided that the debtor was
4 not entitled to recover attorney's fees under the American Rule.
5 In making its determination, the bankruptcy court focused on the
6 purpose of the adversary proceeding. It emphasized that the
7 debtor initiated the adversary proceeding to discharge his
8 student loan debt to Key Bank, not to enforce the terms of the
9 promissory note or contest the amount of the debt to Key Bank.
10 Because the sole legal basis for recovery of attorney's fees did
11 not apply - i.e., the fee provision - the bankruptcy court denied
12 the Attorney Fee Motion.

13 On September 26, 2012, the bankruptcy court entered an order
14 on both the Cost Bill and the Attorney Fee Motion ("Cost and Fee
15 Order"). In the Cost and Fee Order, the bankruptcy court allowed
16 the debtor \$10.82 in costs for service of process but denied all
17 other costs.⁹ It denied the Attorney Fee Motion in its entirety.

18
19 ⁸ The bankruptcy court also observed:

20 No matter how you look at this or how you cut it,
21 [the amount was] way too much in the way of attorney's
22 fees in a case for hardship, to have his student loans
23 declared to be a hardship, and therefore,
24 dischargeable.

25 It's either a case of over-lawyering, or a case
26 where the lawyer was not familiar with bankruptcy law
27 or bankruptcy trials, because there's no way that a
28 two-hour trial or three-hour trial, should require
preparation time and trial time that totals \$125,000.

Tr. of September 10, 2012 Hr'g, 30:23-25, 31:1-6.

⁹ Although it allowed the debtor to recover filing fees and
(continued...)

1 The debtor timely appealed the Cost and Fee Order.

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction under 28 U.S.C.
4 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
5 § 158.

6 **ISSUES**

7 (1) Did the bankruptcy court abuse its discretion in
8 allowing \$10.82 in costs for service of process only?

9 (2) Did the bankruptcy court abuse its discretion in
10 denying the Attorney Fee Motion in its entirety?

11 **STANDARDS OF REVIEW**

12 We review a bankruptcy court's refusal to award attorney's
13 fees for an abuse of discretion. Renfrow v. Draper, 232 F.3d
14 688, 693 (9th Cir. 2000); Dinan v. Fry (In re Dinan), 448 B.R.
15 775, 783 (9th Cir. BAP 2011). We also review a bankruptcy
16 court's allowance or disallowance of costs for abuse of
17 discretion. Kalitta Air LLC v. Cent. Tex. Airborne Sys. Inc.,
18 --- F.3d ---, 2013 WL 6670795 at *2 (9th Cir. 2013); Young v.
19 Aviva Gelato, Inc. (In re Aviva Gelato, Inc.), 94 B.R. 622, 624
20 (9th Cir. BAP 1988), aff'd, 930 F.2d 26 (9th Cir. 1991)(table).
21 We also review its rulings regarding the local rules for abuse of
22 discretion. Kalitta Air LLC, 2013 WL 6670795 at *2.

23 We apply a two-part test to determine objectively whether
24 the bankruptcy court abused its discretion. United States v.

25 _____
26 ⁹(...continued)
27 costs for service of process, the bankruptcy court noted that the
28 debtor was not required to pay the filing fee for the adversary
proceeding. It therefore determined the amount for filing fees
to be zero.

1 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(en banc). First,
2 we “determine de novo whether the bankruptcy court identified the
3 correct legal rule to apply to the relief requested.” Id.
4 Second, we examine the bankruptcy court’s factual findings under
5 the clearly erroneous standard. Id. at 1262 & n.20. A
6 bankruptcy court abuses its discretion if it applied the wrong
7 legal standard or its factual findings were illogical,
8 implausible or without support in the record. TrafficSchool.com,
9 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

10 We review de novo the bankruptcy court’s decision to deny
11 attorney’s fees under state law. See Dinan, 448 B.R. at 783
12 (citing Bertola v. N. Wis. Produce Co., Inc. (In re Bertola), 317
13 B.R. 95, 99 (9th Cir. BAP 2004)).

14 We may affirm on any ground supported by the record. Shanks
15 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

16 **DISCUSSION**

17 A. Cost Bill

18 Rule 7054(b) provides in relevant part: “The court may allow
19 costs to the prevailing party except when a statute of the United
20 States or these rules otherwise provides.” Rule 7054(b) arises
21 from Civil Rule 54(d)(1), which provides in relevant part:
22 “Unless a federal statute, these rules, or a court order provides
23 otherwise, costs - other than attorney’s fees - should be allowed
24 to the prevailing party.”

25 Civil Rule 54(d)(1) appears mandatory in nature, as it
26 states that costs “should be allowed,” unless it or federal
27 statute or rule otherwise directs. See 10 Collier on Bankruptcy
28 ¶ 7054.05 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev.

1 2013)("[A]lthough ultimately leaving the question of costs to the
2 discretion of the court, [Civil Rule 54(d)] provides that the
3 court 'should' allow costs to the prevailing party unless it, a
4 federal statute or a Civil Rule otherwise directs.")(hereinafter
5 referred to as "Collier on Bankruptcy"). Nonetheless, Civil Rule
6 54(d)(1) generally grants a federal court discretion to refuse to
7 tax costs in the prevailing party's favor. Crawford Fitting Co.
8 v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987).

9 On the other hand, Rule 7054(b) is permissive in nature, as
10 it states that the bankruptcy court "may allow costs." (Emphasis
11 added.) See In re Aviva Gelato, Inc., 94 B.R. at 624 ("Although
12 [Civil] Rule 54(d) appears to be more mandatory in nature than
13 [Rule] 7054(b), the Ninth Circuit has consistently recognized
14 that the trial court has discretion as to what costs to
15 allow.")(citation omitted). See also 10 Collier on Bankruptcy
16 ¶ 7054.05. Although it has broad discretion in determining
17 whether to deny costs, the bankruptcy court must state its
18 reasons for denying them. In re Aviva Gelato, Inc., 94 B.R. at
19 624.

20 The debtor contends that the bankruptcy court erred in
21 limiting recoverable costs to those listed in the Court Manual
22 pursuant to LBR 7054-1(d). Instead, according to the debtor, the
23 bankruptcy court should have referenced 28 U.S.C. § 1920, which
24 permits recovery of reasonable out-of-pocket expenses typically
25 charged to clients by their attorneys.

26 We decline to consider the debtor's argument regarding 28
27 U.S.C. § 1920, as he did not raise it before the bankruptcy
28

1 court.¹⁰ See Enewally v. Wash. Mut. Bank (In re Enewally), 368
2 F.3d 1165, 1173 (9th Cir. 2004) (“As a general rule, issues not
3 presented to the trial court cannot generally be raised for the
4 first time on appeal,” unless one of the four recognized
5 exceptions apply.) (quoting United States v. Flores-Payon, 942
6 F.2d 556, 558 (9th Cir. 1991) (internal quotation marks omitted)).

7 As for the bankruptcy court’s reliance on LBR 7054-1, we
8 conclude there was no error. The general rule is that the
9 bankruptcy court’s authority to tax a cost must come from “a
10 federal statute or rule of court, or in the custom, practice and
11 usage applicable in a particular district, and in some instances
12 by the exercise of the court’s general equitable discretion.” 10
13 Collier on Bankruptcy ¶ 7054.05. According to LBR 1001-1(b)(2),
14 the Local Bankruptcy Rules “apply to all bankruptcy cases and
15 proceedings . . . pending in the United States Bankruptcy Court
16 for the Central District of California.”

17 Here, the bankruptcy court’s authority to allow or deny
18 costs arose from the local rules of its district. It therefore
19 could allow such costs within the parameters of the local rules -
20 specifically, those costs listed in the Court Manual pursuant to
21 LBR 7054-1(d).

22 LBR 7054-1 provides, in relevant part:

23 a. Who May Be Awarded Costs. When costs are allowed
24 by the FRBP or other applicable law, the court may

25
26 ¹⁰ Moreover, considering 28 U.S.C. § 1920, the Ninth
27 Circuit recently held that “the better course is to hew closely
28 --- F.3d ----, 2013 WL 6670795 at *3 (citing Taniguchi v. Kan
Pacific Saipan, Ltd., 132 S.Ct. 1997, 2006 (2012)).

1 award costs to the prevailing party. No costs
2 will be allowed unless a party qualifies as, or is
3 determined by the court to be, the prevailing
4 party under this rule. Counsel are advised to
5 review 28 U.S.C. § 1927 regarding counsel's
6 liability for excessive costs.

7
8 d. Items Taxable as Costs. A list of the items
9 taxable as costs is contained in the Court Manual
10 available from the clerk and on the court's
11 website.

12
13 Section 2.8 of the Court Manual for the United States
14 Bankruptcy Court for the Central District of California provides,
15 in relevant part:

16 2.8 Miscellaneous

17
18 (d) Bill of Costs [LBR 7054-1].

19 A bill of costs filed electronically or non-
20 electronically must comply with LBR 7054-1.
21 The prevailing party who is awarded costs
22 must file and serve a bill of costs not later
23 than 30 days after entry of judgment. Each
24 item claimed must be set forth separately in
25 the bill of costs.

26 (e) Items Taxable as Costs. Pursuant to LBR
27 7054-1, the following items are taxable as
28 costs:

- 29 (1) Filing Fees. The clerk's filing fees;
- 30 (2) Fees for Service of Process. Fees for
31 service of process (whether served by
32 the United States Marshal or in any
33 other manner authorized by FRBP 7004);
- 34 (3) United States Marshal's Fees. Fees of
35 the United States Marshal collected and taxed
36 as costs pursuant to 28 U.S.C. § 1921;
- 37 (4) Clerk's Fees. Fees for certification of
38 documents necessary for preparation for
39 a hearing or trial; and
- 40 (5) Transcripts and Digital Recordings. The
41 costs of the original and one copy of
42 all or any part of a trial transcript,
43 daily transcript, or a transcript of
44 matters occurring before or after trial,
45 if requested by the court or prepared
46 pursuant to stipulation. The cost of a

1 digital recording, if requested by the
2 court or obtained pursuant to
3 stipulation.

- 4 (6) Depositions. Costs incurred in
5 connection with taking depositions,
6 including:
- 7 (7) Witness Fees. Fees paid to witnesses
- 8 (8) Interpreter's and Translator's Fees.
9 Fees paid to interpreters and
10 translators . . .
- 11 (9) Docket Fees. Docket fees as provided by
12 28 U.S.C. § 1923.
- 13 (10) Certification, Exemplification, and
14 Reproduction of Documents. Document
15 preparation costs, including:
- 16 (A) The cost of copies of an exhibit
17 attached to a document necessarily
18 filed and served;
- 19 (B) The cost of copies of a document
20 admitted into evidence when the
21 original is not available or the
22 copy is substituted for the
23 original at the request of an
24 opposing party;
- 25 (C) Fees for an official certification
26 of proof respecting the non-
27 existence of a document or record;
- 28 (D) Patent Office charges for the
patent file wrappers and prior art
patents necessary to the
prosecution or defense of a
proceeding involving a patent;
- (E) Notary fees incurred in notarizing
a document when the cost of the
document is taxable; and
- (F) Fees for necessary certification or
exemplification of any document.
- (12) Other Costs. Upon order of the court,
additional items, including the
following, may be taxed as costs:
- (A) Summaries, computations, polls,
surveys, statistical comparisons,
maps, charts, diagrams, and other
visual aids reasonably necessary to
assist the court or jury in
understanding the issues at the
trial;
- (B) Photographs, if admitted in
evidence or attached to documents
necessarily filed and served upon
the opposing party; and
- (C) The cost of models if ordered by
the court in advance of or during
trial.

.

1 Reviewing the Cost Bill Itemization, we conclude that only
2 one of the requested costs - the certified mail postage for
3 service of the alias summons and notice of the status conference
4 - was recoverable under LBR 7054-1(d).

5 Ms. Fitzpatrick listed costs for printing status reports,
6 summons, orders, notices, responses to interrogatories,
7 stipulations, briefs, declarations and exhibit lists, none of
8 which qualify as document preparation costs under Section
9 2.8(e)(10) of the Court Manual. She also listed costs for
10 numerous faxes from the debtor, explaining that these faxes were
11 "evidentiary documents." Ms. Fitzpatrick failed to specify these
12 "evidentiary documents" and to explain their purpose. Given her
13 lack of explanation, we only can assume that she printed
14 documents and had documents faxed to her for her convenience or
15 her records. See, e.g., Fressell v. AT&T Tech., Inc., 103 F.R.D.
16 111, 116 (N.D. Ga. 1984)(denying successful defendant's request
17 for photocopying charges "for the convenience, preparation,
18 research, or records of counsel" under 28 U.S.C. § 1920).

19 She also listed postage for the service of various
20 documents. Section 2.8(e)(2) of the Court Manual allows for the
21 recovery of postage fees for documents served in the manner
22 required by Rule 7004. Ms. Fitzpatrick included postage, not
23 only for the alias summons, but for scheduling orders, responses
24 to interrogatories, status reports, trial briefs and
25 stipulations. Rule 7004 only requires a particular manner of
26 service for the summons and complaints. See 10 Collier on
27 Bankruptcy ¶ 7004.01. The other postage costs are not covered
28 under Section 2.8(e)(2) of the Court Manual.

1 Ms. Fitzpatrick further listed various miscellaneous costs,
2 such as telephone charges, messenger services, transportation,
3 online software purchases, research and document retrieval
4 charges and fees for two attorneys. Again, none of these costs
5 are listed in Section 2.8(e) of the Court Manual.

6 Based on the foregoing, we conclude that the bankruptcy
7 court did not abuse its discretion in denying all but the service
8 costs requested in the Cost Bill.

9 B. Attorney's Fee Motion¹¹

10 _____
11 ¹¹ The debtor challenges the bankruptcy court's ruling on
12 several grounds, which we've distilled down to two.

13 First, he argues that the bankruptcy court unfairly and
14 erroneously relied on Krasinski v. Goldstein (In re Goldstein),
15 2011 WL 3608243 (Bankr. D. Ariz. 2011), an unpublished decision.
16 According to the debtor, the bankruptcy court denied the Attorney
17 Fee Motion based on the reasoning set forth in the Goldstein
18 decision. The debtor claims that he could not effectively refute
19 the reasoning in the Goldstein decision because he could not
20 obtain a copy of the Goldstein decision. He further asserts that
21 Goldstein was legally and factually distinguishable from the
22 underlying matter.

23 Contrary to the debtor's assertion, the bankruptcy court did
24 not rely on the Goldstein decision in denying the Attorney Fee
25 Motion. Because Key Bank cited the Goldstein decision, the
26 bankruptcy court believed it "[was] going to have to read this
27 Goldstein opinion." Tr. of September 10, 2012 Hr'g, 27:16-17.
28 Upon reading it, the bankruptcy court acknowledged that "in this
case, we have a little slightly different situation [than that in
the Goldstein decision]." Tr. of September 10, 2012 Hr'g, 34:1-
2. The bankruptcy court took care to distinguish the instant
matter from Goldstein, stressing that Key Bank did not "sue [the
debtor]. It was [the debtor] who sought to have the debt
declared [dischargeable]. There was no dispute under the
contract as to whether he owed any sums or not. The dispute was
whether this should be discharged as a hardship debt or not."
Tr. of September 10, 2012 Hr'g, 34:3-8.

Second, the debtor contends that the bankruptcy court should
have allowed his attorney's fees in full unless Key Bank

(continued...)

1 On appeal, the debtor mainly contends that the bankruptcy
2 court erred in denying the Attorney Fee Motion by ignoring Civil
3 Code § 1717.¹² He insists that Civil Code § 1717 applies.¹³

4
5 ¹¹(...continued)
6 demonstrated, through evidence, that they were unreasonable.
7 However, the bankruptcy court would not get to reasonableness,
8 unless it first determined that there was a statutory or
9 contractual basis for an award of fees.

10 ¹² The debtor also relies on Civil Code § 1021 in support
11 of his argument. Because the debtor did not raise Civil Code §
12 1021 as an issue before the bankruptcy court, we decline to
13 address it here. See Enewally, 368 F.3d at 1173.

14 ¹³ The debtor also claims that the bankruptcy court
15 acknowledged the applicability of Civil Code § 1717 but
16 misapplied it.

17 At the hearing, the bankruptcy court mentioned that the
18 debtor relied on Civil Code § 1717. It also stated that it had
19 "the California statute that says, okay, what's good for the
20 goose is good for the gander, so to speak." Tr. of September 12,
21 2012 Hr'g, 32:18-20.

22 Given the bankruptcy court's reasoning as stated on the
23 record at the hearing, we do not believe that the bankruptcy
24 court applied Civil Code § 1717 at all. The bankruptcy court
25 denied the Attorney Fee Motion because the legal basis for
26 recovery of attorney's fees, the fee provision, did not apply as
27 the adversary proceeding arose from a federal claim (i.e.,
28 § 523(a)(8)), not a contract claim.

Moreover, California courts uniformly have ruled that Civil
Code § 1717 is to be narrowly applied, and is available to a
party only if the dispute involves litigation of a contract
claim. Santisas v. Goodin, 17 Cal. 4th 599 (Cal. 1998)
("[S]ection 1717 applies only to attorney fees incurred to
litigate contract claims."). The BAP previously has relied upon
Santisas on this specific issue. Redwood Theaters, Inc. v.
Davison (In re Davison), 289 B.R. 716, 723 (9th Cir. BAP
2003)("[W]e will follow [the Santisas] holding and narrowly apply
[Civil Code] § 1717 and approve attorney's fees only if the
action involves a contract claim."). Based on California
controlling law and BAP authority, we have held that Civil Code
§ 1717 only can be applied to attorney's fees disputes based on

(continued...)

1 We disagree. There simply is no statutory or contractual
2 basis allowing the debtor to recover his attorney's fees here.
3 Ordinarily, under the American Rule, a prevailing party may not
4 recover attorney's fees except as provided for by contract or by
5 statute. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.,
6 Co., 549 U.S. 443, 448 (2007); Dinan, 448 B.R. at 784.

7 No general right to recover attorney's fees exists under the
8 Bankruptcy Code. Dinan, 448 B.R. at 784. Also, nothing in
9 § 523(a)(8) authorizes a debtor to recover attorney's fees when
10 he or she prevails in discharging his or her student loan debt.¹⁴

11 Interestingly, Ohio law has established that a contractual
12 provision allowing for the recovery of attorney's fees to enforce
13 a defaulted debt obligation is unenforceable as against public
14

15
16 ¹³(...continued)
17 contract claims. Hamilton v. Charalambous (In re Charalambous),
18 2013 WL 3369299 at *5 (9th Cir. BAP 2013). We follow that
19 holding here.

20 ¹⁴ In contrast, § 523(d) provides:

21 If a creditor requests a determination of
22 dischargeability of a consumer debt under subsection
23 [523(a)(2)], and such debt is discharged, the court
24 shall grant judgment in favor of the debtor for the
25 costs of, and a reasonable attorney's fee for, the
26 proceeding if the court finds that the position of the
27 creditor was not substantially justified, except that
28 the court shall not award such costs and fees if
special circumstances would make the award unjust.

Accordingly, it appears that Congress considered when it
would be appropriate to award costs and attorney's fees to a
prevailing debtor in dischargeability litigation and did not
expressly allow for an award of fees to the prevailing debtor in
§ 523(a)(8) adversary proceedings.

1 policy.¹⁵ See Simons v. Higher Educ. Assistance Found., 119 B.R.
2 589, 593-94 (Bankr. S.D. Ohio 1990)(denying a student loan
3 lender's request for attorney's fees incurred in litigating a
4 debtor's § 523(a)(8) claim because, in Ohio, "stipulations in
5 promissory notes providing for the payment of attorney's fees,
6 arising in connection with the failure to pay the principal and
7 interest balance at maturity, are contrary to public policy and
8 are void," and "[n]o provision exists for the granting of
9 attorneys' fees in proceedings brought pursuant to 11 U.S.C.
10 § 523(a)(8)(B).")(citation omitted). See also McLeod v.
11 Diversified Collection Servs. (In re McLeod), 176 B.R. 455, 458
12 (Bankr. N.D. Ohio 1994)(quoting Simons, 119 B.R. at 593-94).

14 ¹⁵ According to the Ohio Supreme Court, although Ohio
15 generally follows the American Rule, attorney's fees "may be
16 awarded when a statute or an enforceable contract specifically
17 provides for the losing party to pay the prevailing party's
18 attorney fees . . . or when the prevailing party demonstrates bad
19 faith on the part of the unsuccessful litigant" Wilborn
20 v. Bank One Corp., 121 Ohio St. 3d 546, 548 (Ohio 2009)(citations
21 omitted). Contracts providing for payment of attorney's fees
22 "are generally enforceable and not void as against public
23 policy," so long as the parties to the contract entered into it
24 freely (i.e., equal bargaining power was present and no indicia
25 of compulsion or duress were present) and the fees awarded were
26 fair, just and reasonable. Id. at 548-49.

27 However, "contracts for the payment of attorney fees upon
28 the default of a debt obligation are void and unenforceable."
Id. at 549. "It is the settled law of this state that
stipulations incorporated in promissory notes for the payment of
attorney fees, if the principal and interest be not paid at
maturity, are contrary to public policy and void.'" Id. (quoting
Leavans v. Ohio Nat'l Bank, 50 Ohio St. 591 (Ohio
1893)(addressing foreclosure actions)). That is, "a provision in
a mortgage or promissory note that awards attorney fees upon the
enforcement of the lender's rights when the borrower defaults,
such as a foreclosure action that has proceeded to judgment, is
unenforceable." Id. at 550.

