

MAR 07 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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In re:	)	BAP No.	NC-13-1119-KiDJu
	)		
ELAINE L. BROSIO,	)	Bk. No.	12-57468-SLJ
	)		
Debtor.	)		
	)		
_____	)		
	)		
ELAINE L. BROSIO,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
DEUTSCHE BANK NATIONAL	)		
TRUST COMPANY,	)		
	)		
Appellee.	)		
_____	)		

O P I N I O N

Argued and Submitted on February 20, 2014,  
at San Francisco, California

Filed - March 7, 2014

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

Hon. Stephen L. Johnson, Bankruptcy Judge, Presiding

\_\_\_\_\_

Appearances: Jim Erickson, Esq. of the Mlnarik Law Group, Inc.  
argued for appellant, Elaine L. Brosio; Steven K.  
Linkon, Esq. of RCO Legal, PS argued for appellee,  
Deutsche Bank National Trust Company.

Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

2

3 Debtor Elaine L. Brosio ("Brosio") appeals an order denying  
4 her motion for attorney's fees on the basis that she was not the  
5 prevailing party under CAL. CIV. CODE § 1717 and that the fees  
6 requested were not reasonable. We AFFIRM.

7

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 Brosio filed a chapter 13<sup>1</sup> bankruptcy case on October 16,  
9 2012. Among the assets was Brosio's residence. In connection  
10 with the residence, Brosio had executed a note ("Note") and deed  
11 of trust ("DOT") in January 2007 in favor of former lender, Paul  
12 Financial, LLC. Appellee Deutsche Bank National Trust Company  
13 ("Deutsche Bank") recorded the assignment of the DOT on November  
14 9, 2012.

15 Paragraph 9 of the DOT, "Protection of Lender's Interest in  
16 the Property and Rights Under this Security Instrument," provides,  
17 in relevant part:

18 If (a) Borrower fails to perform the covenants and  
19 agreements contained in this Security Instrument; (b)  
20 there is a legal proceeding that might significantly  
21 affect Lender's interest in the Property and/or rights  
22 under this Security Instrument (such as a proceeding in  
23 bankruptcy, probate, for condemnation or forfeiture, for  
24 enforcement of a lien which may attain priority over this  
25 Security Instrument, or to enforce laws or regulations)  
26 . . . then Lender may do and pay for whatever is  
reasonable or appropriate to protect Lender's interest in  
the Property and rights under this Security Instrument,  
including protecting and/or assessing the value of the  
Property, and securing and/or repairing the Property.  
Lender's actions can include, but are not limited to:  
(a) paying any sums secured by a lien which has priority  
over this Security Instrument; (b) appearing in court;

---

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

1 and (c) paying reasonable attorneys' fees to protect its  
2 interest in the Property and/or rights under this  
3 Security Instrument, including its secured position in a  
4 bankruptcy proceeding . . . . Any amounts disbursed by  
Lender under this Section 9 shall become additional debt  
of Borrower secured by this Security Instrument.

5 Paragraph 14 of the DOT, "Loan Charges," provides, in relevant  
6 part:

7 Lender may charge Borrower fees for services performed in  
8 connection with Borrower's default, for the purpose of  
9 protecting Lender's interest in the Property and rights  
10 under this Security Instrument, including, but not  
limited to, attorneys' fees, property inspection and  
valuation fees . . . .

11 Paragraph 22 of the DOT, "Acceleration; Remedies," provides, in  
12 relevant part:

13 Lender shall be entitled to collect all expenses incurred  
14 in pursuing the remedies provided in this Section 22,  
15 including, but not limited to, reasonable attorneys' fees  
and costs of title evidence.

16 Finally, Paragraph 7(E) of the Note, "Borrower's Failure to Pay as  
17 Required," provides:

18 If the Note Holder has required me to pay immediately in  
19 full as described above, the Note Holder will have the  
20 right to be paid back by me for all of its costs and  
21 expenses in enforcing this Note to the extent not  
prohibited by applicable law. Those expenses include,  
for example, reasonable attorneys' fees.

22 Loan servicer GMAC Mortgage, LLC filed a proof of claim  
23 ("POC") on behalf of Deutsche Bank, asserting a secured claim for  
24 \$587,050.61. The amount claimed in the POC included the principal  
25 balance of \$585,771.36, \$854.25 in interest, and \$425.00 for  
26 "attorney fees for filing proof of claim, reviewing plan and  
27 filing request for special notice[.]" Brosio was current in her  
28 mortgage payments at the time the POC was filed.

1 Brosio filed a one-page form objection to the POC, disputing  
2 only the attorney fee of \$425.00 ("Claim Objection"). Brosio  
3 contended the fees were "inappropriate" and "were not justified by  
4 Creditor's need to assert their [sic] property rights, in that  
5 Debtor is current in payments and has not given any indication  
6 that Creditor's interest in the property is at risk or that  
7 foreclosure will become an option for Creditor." No hearing was  
8 requested, set or held for the Claim Objection.

9 Deutsche Bank subsequently filed an amended POC removing the  
10 \$425.00 attorney fee. Brosio's counsel contacted counsel for  
11 Deutsche Bank seeking reimbursement for the \$865.00 she incurred  
12 in attorney's fees filing the Claim Objection. Deutsche Bank  
13 declined to pay the fees.

14 **A. Brosio's motion for attorney's fees**

15 On January 24, 2013, Brosio moved for an order awarding her  
16 attorney's fees and costs "for her successful objection" to the  
17 POC ("Fee Motion"). Brosio argued that because her objection to  
18 the \$425.00 attorney fee prompted Deutsche Bank to file an amended  
19 POC removing the fee (thus implicitly withdrawing the original  
20 POC), she was "the prevailing party in an action on a contract"  
21 and was therefore entitled to fees and costs under CAL. CIV. CODE P.  
22 ("CCP") §§ 1032 and 1033.5(a)(10), and CAL. CIV. CODE ("CCC")  
23 § 1717. Brosio based her claim on the attorney's fees provisions  
24 found in Paragraphs 9, 14 and 22 of the DOT and Paragraph 7(E) of  
25 the Note.

26 Recognizing that no hearing or further litigation occurred in  
27 connection with her Claim Objection, Brosio argued that California  
28 law still allowed for her fees as the "prevailing party," citing

1 Hsu v. Abbara, 9 Cal. 4th 863, 877 (1995), which held that a party  
2 may "be found to be a prevailing party if it is clear that the  
3 party has otherwise achieved its main litigation objective," and  
4 Scott Co. v. Blount, Inc., 20 Cal. 4th 1103, 1109 (1999), which,  
5 relying on Hsu, held: "When a party obtains a simple, unqualified  
6 victory by completely prevailing on or defeating all contract  
7 claims in the action and the contract contains a provision for  
8 attorney fees, section 1717 entitles the successful party to  
9 recover reasonable attorney fees incurred in prosecution or  
10 defense of those claims." Brosio cited two additional unpublished  
11 cases she contended supported her Fee Motion: Moran v. Deutsche  
12 Bank Nat'l Trust Co. (In re Moran), 2012 WL 6645025 (Bankr. D.  
13 Haw. Dec. 20, 2012); and Aurora Loan Servs., LLC v. Guzman, 2012  
14 WL 359684 (N.D. Cal. Feb. 2, 2012).<sup>2</sup>

15 Brosio conceded that no "prevailing party" exists where the  
16 action has been voluntarily dismissed or dismissed pursuant to a  
17 settlement of the case. CCC § 1717(b)(2).<sup>3</sup> However, Brosio

18 \_\_\_\_\_  
19 <sup>2</sup> Brosio argued that in Moran, the bankruptcy court awarded  
20 attorney's fees to a debtor (under Hawaii's version of CCC § 1717)  
21 for objecting to a proof of claim that was later withdrawn, based  
22 on an attorney's fee provision in the note and deed of trust. In  
23 Guzman, the district court affirmed the bankruptcy court's award  
24 of fees to a debtor under CCC § 1717 who had lost a stay violation  
25 action against the creditor, but prevailed in reducing the  
26 creditor's proof of claim by several hundred dollars for improper  
27 overcharges. The district court determined that the stay  
28 violation action could be viewed as an action "on a contract"  
within the meaning of CCC § 1717, because debtor had also alleged  
that no contractual basis existed for the creditor to impose the  
charges in the first place.

26 <sup>3</sup> CCC § 1717(b)(2) provides:

27 Where an action has been voluntarily dismissed or dismissed  
28 pursuant to a settlement of the case, there shall be no

(continued...)

1 argued that because she, as the objector, was in the position of  
2 "plaintiff," the voluntary withdrawal/amendment of the POC by  
3 "defendant" Deutsche Bank was not a voluntary dismissal.

4 In support of her Fee Motion, Brosio's counsel submitted a  
5 declaration setting forth the time spent on the matter by various  
6 firm members. In addition to the \$865.00 in fees Brosio incurred  
7 in filing her Claim Objection, she sought \$3,010.00 incurred  
8 preparing the Fee Motion and related papers and \$1,400.00 for her  
9 anticipated reply to Deutsche Bank's response and hearing  
10 attendance, for a total request of \$5,265.00.<sup>4</sup>

11 Deutsche Bank opposed the Fee Motion, contending that Brosio  
12 was not entitled to attorney's fees under CCC § 1717 because she  
13 had not "prevailed" in her Claim Objection, as no order sustaining  
14 her objection was entered, and because her Claim Objection was not  
15 a "successful" contested matter. Deutsche Bank argued that its  
16 claimed \$425.00 attorney fee was supported by Paragraph 9 in the  
17 DOT, which authorized such charges due to Brosio's bankruptcy  
18 filing, and that it only amended the POC removing the fee as a  
19 courtesy and in the interest of conserving judicial resources; it  
20 was not an admission of wrongdoing.

21 In her reply, Brosio contended that no "order" had to be  
22 entered on the Claim Objection for her to be entitled to fees  
23 under CCC § 1717. Brosio argued that even if Deutsche Bank's  
24 \$425.00 attorney fee was justified, the claim was implicitly

25

26

---

<sup>3</sup>(...continued)  
27 prevailing party for purposes of this section.

28

<sup>4</sup> The requested amounts add to \$5,275.50.

1 withdrawn and an amended claim was filed. Therefore, argued  
2 Brosio, she "prevailed" because it was clear she had achieved her  
3 main litigation objective of removal of the fee. In any event,  
4 Brosio argued that Deutsche Bank could not rely on Paragraph 9 of  
5 the DOT to justify its fees; she was not in default on the Note  
6 nor did she present any risk of default, so Deutsche Bank had no  
7 need to protect its interest in the collateral by filing a proof  
8 of claim. Lastly, Brosio argued that Deutsche Bank should have  
9 accepted her reasonable settlement offer of \$865.00. Attached to  
10 Brosio's reply was a declaration from counsel asserting that her  
11 fees now totaled \$6,535.00.

12 **B. The bankruptcy court's ruling on the Fee Motion**

13 A hearing on the Fee Motion was held on February 21, 2013.  
14 After brief argument by the parties, the bankruptcy court read its  
15 oral ruling into the record. The court began by noting that it  
16 "never considered the [Claim Objection]" and "made no rulings on  
17 the appropriateness or the legal sufficiency of either the [POC],  
18 the amended [POC], or the [Claim Objection]." Hr'g Tr. (Feb. 21,  
19 2013) 5:7-11. After reviewing the language of CCC § 1717(a), the  
20 court then stated that two questions were presented by the Fee  
21 Motion: Was Brosio the prevailing party? And, were the requested  
22 fees reasonable?

23 The bankruptcy court found that Brosio was not the prevailing  
24 party for two reasons. First, according to the Note, Deutsche  
25 Bank was entitled to charge the \$425.00 attorney's fee. Id. at  
26 6:23-7:5. Second, the amended POC, which removed the \$425.00 fee  
27 but still sought over \$500,000 from Brosio, was "not an  
28 unmitigated win for [Brosio]." Id. at 7:5-16. The court

1 distinguished Moran and Guzman as either factually dissimilar or  
2 not precedential in any event. The court also found that Brosio's  
3 requested fees were not reasonable; the almost \$5,600.00 she  
4 sought was disproportionate to the \$425.00 in fees to which she  
5 objected.

6 The bankruptcy court entered an order denying Brosio's Fee  
7 Motion on February 27, 2013 ("Fee Order"). This timely appeal  
8 followed.

## 9 II. JURISDICTION

10 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
11 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

## 12 III. ISSUES

13 1. Did the bankruptcy court err in determining that Brosio was  
14 not the prevailing party?

15 2. Did the bankruptcy court erroneously determine the  
16 reasonableness of Brosio's requested fees as an element in the  
17 analysis of whether any fees at all should be awarded?

## 18 IV. STANDARDS OF REVIEW

19 We review a bankruptcy court's refusal to award attorney's  
20 fees for an abuse of discretion. Renfrow v. Draper, 232 F.3d 688,  
21 693 (9th Cir. 2000); Dinan v. Fry (In re Dinan), 448 B.R. 775, 783  
22 (9th Cir. BAP 2011). "[A] court's decision that there was no  
23 'prevailing party on the contract' is subject to review under the  
24 abuse of discretion standard of review." City of Emeryville v.  
25 Robinson, 621 F.3d 1251, 1266 (9th Cir. 2010)(citations omitted).  
26 A bankruptcy court abuses its discretion if it applied the wrong  
27 legal standard or its factual findings were illogical, implausible  
28 or without support in the record. TrafficSchool.com, Inc. v.



1 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

2 The bankruptcy court's application and interpretation of  
3 California law will be reviewed de novo. Viceroy Gold Corp. v.  
4 Aubry, 75 F.3d 482, 488 (9th Cir. 1996).

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

7 **V. DISCUSSION**

8 **A. CCC § 1717**

9 CCC § 1717 provides a basis for a party to recover attorney's  
10 fees incurred in litigation of a contract claim. It provides, in  
11 relevant part:

12 (a) In any action on a contract, where the contract  
13 specifically provides that attorney's fees and costs,  
14 which are incurred to enforce that contract, shall be  
15 awarded either to one of the parties or to the prevailing  
16 party, then the party who is determined to be the party  
17 prevailing on the contract, whether he or she is the  
18 party specified in the contract or not, shall be entitled  
19 to reasonable attorney's fees in addition to other  
20 costs. . . . Reasonable attorney's fees shall be fixed by  
21 the court, and shall be an element of the costs of suit.

22 (b)(1) The court, upon notice and motion by a party,  
23 shall determine who is the party prevailing on the  
24 contract for purposes of this section, whether or not the  
25 suit proceeds to final judgment. Except as provided in  
26 paragraph (2), the party prevailing on the contract shall  
27 be the party who recovered a greater relief in the action  
28 on the contract. The court may also determine that there  
is no party prevailing on the contract for purposes of  
this section.

23 CCC § 1717(a), (b)(1).

24 Attorney's fees awarded under CCC § 1717 are specifically  
25 allowed as a recoverable cost under CCP §§ 1032 and 1033.5. CCP  
26 § 1033.5(c)(5).<sup>5</sup> CCC § 1717 creates a reciprocal right to recover

27 \_\_\_\_\_  
28 <sup>5</sup> CCP § 1033.5(c)(5) provides, in relevant part:

(continued...)

1 attorney's fees as costs in a dispute over a contract containing  
2 an attorney fee clause, regardless of whether the attorney fee  
3 clause provision in the contract would have allowed for reciprocal  
4 recovery. Santisas v. Goodin, 17 Cal. 4th 599, 610-11 (1998).

5 **B. The bankruptcy court did not err in determining that Brosio**  
6 **was not the prevailing party.**

7 Brosio contends the bankruptcy court erred in determining she  
8 was not the "prevailing party." Specifically, she contends that  
9 her sole litigation objective was to remove the \$425.00 attorney  
10 fee from the amount claimed by Deutsche Bank in its POC, and by  
11 Deutsche Bank amending its POC to remove the fee, it implicitly  
12 withdrew its original claim. Therefore, Brosio contends that she  
13 clearly and unequivocally prevailed on the sole issue litigated in  
14 the action on the contract.

15 Brosio argues that the size of the mortgage in comparison to  
16 the victory on the fees was of no relevance because the "action on  
17 the contract" was not an action on Deutsche Bank's entire claim,  
18 it was on the sole issue of the attorney's fee. She contends the  
19 bankruptcy court erred by equating "action on the contract" with  
20 the entire claim, rather than the discrete legal proceeding over  
21 the disputed fee. Brosio also argues that lack of an order on her  
22 Claim Objection was of no importance to the issue of prevailing

23 \_\_\_\_\_  
24 <sup>5</sup>(...continued)

25 (c) Any award of costs shall be subject to the following:  
26 . . .

27 (5) . . . Attorney's fees awarded pursuant to Section 1717 of  
28 the Civil Code are allowable costs under Section 1032 of this  
code as authorized by subparagraph (A) of paragraph (10) of  
subdivision (a).

1 party.

2 Deutsche Bank contends that, in addition to Brosio failing to  
3 submit any evidence in support of her Claim Objection, she could  
4 not be the "prevailing party" because the bankruptcy court never  
5 rendered any decision on the Claim Objection or the POC; hence, no  
6 party obtained a "victory" or "unqualified win" on the submitted  
7 claim. We agree.

8 Determination of "prevailing party" for the purpose of  
9 reciprocal attorney's fees in California is guided by the  
10 California Supreme Court's decision in Hsu:

11 Accordingly, we hold that in deciding whether there is a  
12 "party prevailing on the contract," the trial court is to  
13 compare the relief awarded on the contract claim or  
14 claims with the parties' demands on those same claims and  
15 their litigation objectives as disclosed by the  
16 pleadings, trial briefs, opening statements, and similar  
sources. The prevailing party determination is to be  
made only upon final resolution of the contract claims  
and only by "a comparison of the extent to which each  
party has succeeded and failed to succeed in its  
contentions." [Internal citation omitted].

17 9 Cal. 4th at 876. Hsu, wherein the court determined the merits  
18 of the contract claim at issue, also held that when the results of  
19 the litigation on the contract claims are not mixed – that is,  
20 when the court's decision is purely good news for one party and  
21 bad for the other – the trial court has no discretion to deny  
22 attorney's fees to the successful party. Id. at 875-76.

23 Thus, when a defendant defeats recovery by the plaintiff  
24 on the only contract claim in the action, the defendant  
is the party prevailing on the contract under section  
1717 as a matter of law. [Internal citations omitted].  
25 Similarly, a plaintiff who obtains all relief requested  
26 on the only contract claim in the action must be regarded  
as the party prevailing on the contract for purposes of  
attorney fees under section 1717. [Internal citations  
27 omitted].

28 Id. at 876. "*In determining litigation success, courts should*

1 respect substance rather than form, and to this extent should be  
2 guided by 'equitable considerations.' For example, a party who is  
3 denied direct relief on a claim may nonetheless be found to be a  
4 prevailing party if it is clear that the party has otherwise  
5 achieved its main litigation objective." Id. at 877 (citations  
6 omitted)(emphasis in original).

7 Some appellate courts in California have held that the court  
8 can determine a "prevailing party" and award attorney's fees under  
9 CCC § 1717, even when that party has prevailed only on a discrete  
10 legal proceeding and the merits of the underlying contract dispute  
11 have not yet been decided. This issue most often arises in the  
12 context of motions to compel arbitration, or when an action (or  
13 defendant) is dismissed on procedural grounds. See Kandy Kiss of  
14 Cal., Inc. v. Tex-Ellent, Inc., 209 Cal.App.4th 604, 613-14 (2012)  
15 (defendant who prevails by obtaining a dismissal for lack of  
16 subject matter jurisdiction is entitled to contractual attorney's  
17 fees, even though plaintiff is able to refile in another forum);  
18 PNEC Corp. v. Meyer, 190 Cal.App.4th 66, 71 (2010)(awarding fees  
19 to defendant where complaint was dismissed on forum non conveniens  
20 grounds, even though no adjudication on the actual contract  
21 dispute had occurred and may still occur in another forum); Profit  
22 Concepts Mgmt., Inc. v. Griffith, 162 Cal.App.4th 950, 955-56  
23 (2008)(trial court dismissed defendant for lack of personal  
24 jurisdiction and plaintiff awarded nothing on claim; appellate  
25 court held that determination on merits of contract claim was not  
26 required for trial court to award attorney's fees under  
27 CCC § 1717; the contract claim was "finally resolved" within the  
28 meaning of Hsu); Otay River Constructors v. San Diego Expressway,

1 158 Cal.App.4th 796, 806-08 (2008)(where no contract action  
2 pending and petition to compel arbitration is filed, successful  
3 defense of the petition allows an award of prevailing party  
4 attorney's fees, even though merits of contract dispute may be  
5 decided later).

6       However, some California courts have disagreed with this  
7 notion. See HSBC Bank USA v. DJR Props., Inc., 2011 WL 1404899,  
8 at \*2 (E.D. Cal. Apr. 13, 2011)(dismissal for lack of subject  
9 matter jurisdiction; rejecting Profit Concepts as inconsistent  
10 with the plain language of CCC § 1717 and Hsu's holding that  
11 prevailing party can only be determined upon "final resolution" of  
12 the contract claims); Idea Place Corp. v. Fried, 390 F.Supp.2d  
13 903, 904-05 (N.D. Cal. 2005)(district court denied fees under CCC  
14 § 1717 based on dismissal for lack of subject matter jurisdiction;  
15 plaintiff could still pursue contract claims in state court, so  
16 "prevailing party" on the action remained to be seen); Frog Creek  
17 Partners, LLC v. Vance Brown, Inc., 206 Cal.App.4th 515, 538-39  
18 (2012)(defeating petition to compel arbitration filed in pending  
19 contract action does not justify attorney's fees because merits of  
20 contract action are still to be determined and there can only be  
21 one prevailing party "on the action"); Estate of Drummond, 149  
22 Cal.App.4th 46, 51-52 (2007)(despite dismissal of plaintiff's  
23 claims in probate court, trial court had discretion to deny  
24 defendants' fee motion because litigation was continuing in same  
25 court where separate contract suit had already been filed).

26       Fortunately, we do not have to decide which courts are  
27 correct to resolve this appeal. Brosio fails to address a major  
28 procedural problem presented in this case. In all of the cases

1 she cites to support her fees – Hsu, Otay River Constructors,  
2 Scott Co., Santisas, Moran, Guzman – and in the cases we cited  
3 above, the trial court rendered a "decision" on a pending matter,  
4 whether it be a motion to compel arbitration, a motion to dismiss,  
5 or a judgment after trial, before any party moved for or was  
6 awarded attorney's fees under CCC § 1717. She has not cited, and  
7 we could not locate, a single case with a procedural posture such  
8 as this one where nothing was adjudicated by the court and yet it  
9 considered a party's motion for attorney's fees under CCC § 1717.  
10 Although the bankruptcy court ultimately determined that Brosio  
11 was not the prevailing party because Deutsche Bank was entitled to  
12 charge the \$425.00 fee and because it recovered a greater relief,  
13 the court also noted that it had never made any ruling regarding  
14 the appropriateness or the legal sufficiency of either the POC,  
15 the amended POC, or the Claim Objection. It is on that basis we  
16 affirm the bankruptcy court's ruling.

17 No "final resolution" was ever entered by a court on Deutsche  
18 Bank's POC or Brosio's Claim Objection, whether it be on the  
19 entire claim or the discrete proceeding over the disputed fee.  
20 Hsu, 9 Cal. 4th at 876. For Brosio to be the prevailing party, we  
21 conclude that the bankruptcy court had to first enter some sort of  
22 disposition on these issues. Brosio's "self-proclaimed" victory  
23 is insufficient to trigger an award under CCC § 1717.

24 The California Rules of Court further support our decision.  
25 Under Court Rule 3.1702,<sup>6</sup> which governs the timing of claims for

---

26  
27 <sup>6</sup> Court Rule 3.1702 provides, in relevant part:

28 (a) Application. Except as otherwise provided by statute,  
(continued...)

1 attorney's fees under CCC § 1717, a party must file and serve its  
2 notice and motion for fees within the time for filing a "notice of  
3 appeal." Arguably, one cannot file an appeal without a final  
4 underlying order or judgment from the court, and certainly no  
5 appeal time can run until one is entered. Thus, "some" order or  
6 judgment must exist before a party can move for, or be entitled  
7 to, attorney's fees under CCC § 1717.

8 Alternatively, we conclude that CCC § 1717(b)(2) precluded  
9 Brosio from being the prevailing party. Under CCC § 1717(b)(2),  
10 no prevailing party will exist when an action has been voluntarily  
11 dismissed. Brosio is incorrect when she equates herself to  
12 "plaintiff" and Deutsche Bank as "defendant." The filing of a  
13 proof of claim is analogous to filing a complaint in the  
14 bankruptcy case. United States v. Levoy (In re Levoy), 182 B.R.  
15 827, 833 n.5 (9th Cir. BAP 1995); Smith v. Dowden, 47 F.3d 940,  
16 943 (8th Cir. 1995); Simmons v. Savell (In re Simmons), 765 F.2d

17 \_\_\_\_\_  
18 <sup>6</sup>(...continued)  
19 this rule applies in civil cases to claims for statutory  
20 attorney's fees and claims for attorney's fees provided for  
21 in a contract. Subdivisions (b) and (c) apply when the court  
22 determines entitlement to the fees, the amount of the fees,  
23 or both, whether the court makes that determination because  
24 the statute or contract refers to "reasonable" fees, because  
25 it requires a determination of the prevailing party, or for  
26 other reasons.

23 (b) Attorney's fees before trial court judgment

24 (1) Time for motion

25 A notice of motion to claim attorney's fees for services  
26 up to and including the rendition of judgment in the  
27 trial court – including attorney's fees on an appeal  
28 before the rendition of judgment in the trial court –  
must be served and filed within the time for filing a  
notice of appeal under rules 8.104 and 8.108 in an  
unlimited civil case or under rules 8.822 and 8.823 in a  
limited civil case.

1 547, 552 (5th Cir. 1985); Nortex Trading Corp. v. Newfield, 311  
2 F.2d 163, 164 (2d Cir. 1962); In re Edwards Theatres Circuit,  
3 Inc., 281 B.R. 675, 681 (Bankr. C.D. Cal. 2002). And a claim  
4 objection by the debtor is analogous to an answer. O'Neill v.  
5 Cont'l Airlines (In re Cont'l Airlines), 928 F.2d 127, 129 (5th  
6 Cir. 1991)("[T]he filing of a proof of claim is analogous to the  
7 filing of a complaint in a civil action, with the bankrupt's  
8 objection the same as the answer.")(citing Simmons and Nortex  
9 Trading Corp.); In re Cruisehone, Inc., 278 B.R. 325, 330 (Bankr.  
10 E.D.N.Y. 2002)("In the bankruptcy context, a proof of claim filed  
11 by a creditor is conceptually analogous to a civil complaint, an  
12 objection to the claim is akin to an answer or defense and an  
13 adversary proceeding initiated against the creditor that filed the  
14 proof of claim is like a counterclaim.").

15       Accordingly, Deutsche Bank was the "plaintiff," and Brosio,  
16 as objector to the POC, was in the role of "defendant." Deutsche  
17 Bank's abandonment of its claim for attorney's fees in the amended  
18 POC was akin to a voluntary dismissal, which prevented defendant  
19 Brosio from prevailing on her claim under CCC § 1717. See Ennis  
20 v. Mortgagee Lending, Inc., 2010 WL 3341544, at \*2 (E.D. Cal.  
21 Aug. 24, 2010)(plaintiff's abandonment of breach of contract claim  
22 before trial was akin to voluntary dismissal and precluded  
23 defendants from prevailing on their CCC § 1717 claim); Baldain v.  
24 Am. Home Mortg. Servicing, Inc., 2010 WL 2606666, at \*6 (E.D. Cal.  
25 June 28, 2010)(because plaintiff voluntarily dismissed its TILA  
26 claim by declining to re-plead it in its amended complaint,  
27 defendant was not prevailing party on that claim under CCC  
28 § 1717); Dodson v. Pan Pac. Retail Props., Inc., 2003 WL 25656778,



1 at \*1 (E.D. Cal. June 13, 2003)(holding that defendant was not  
2 prevailing party where plaintiff abandoned claim prior to  
3 trial)(citing Galan v. Wolfriver Holding Corp., 80 Cal.App.4th  
4 1124, 1130 (2000)(when plaintiff has voluntarily dismissed a cause  
5 of action no prevailing party exists as a practical matter);  
6 Gilbert v. Nat'l Enquirer, Inc., 55 Cal.App.4th 1273, 1277-78  
7 (1997)(same).

8 In short, we view the procedural posture of this case as  
9 follows. Deutsche Bank filed its POC (the complaint), and Brosio  
10 filed her Claim Objection (the answer). Deutsche Bank then filed  
11 an amended POC (an amended complaint) in which it abandoned its  
12 claim for attorney's fees. Brosio then, through her Fee Motion,  
13 contended that because Deutsche Bank amended its POC (complaint)  
14 removing the fee claim, she was the "winner" on the "action on the  
15 contract" and entitled to attorney's fees under CCC § 1717. Put  
16 this way, Brosio's Fee Motion makes little sense.<sup>7</sup> Further, to  
17 award fees to Brosio under these circumstances would be punishing  
18 Deutsche Bank for its gesture of civility in removing its claim  
19 for attorney's fees from the POC – a claim the bankruptcy court  
20 determined it was entitled to assert under Paragraph 9 of the DOT.  
21 We agree with that determination.

22 Brosio has complained that Deutsche Bank incurred attorney's  
23 fees only because it discretionarily elected to file an  
24 unnecessary proof of claim. Although secured creditors are not  
25

---

26 <sup>7</sup> Counsel has "an obligation to consider the potential for  
27 recovery and balance the effort required against the results that  
28 at least to the reasonably expected recovery." Unsecured  
Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d 955, 961  
(9th Cir. 1991). Billing judgment is mandatory.

1 required to file a proof of claim in a chapter 13 case, prudent  
2 creditors like Deutsche Bank are certainly entitled to file one to  
3 establish the amount they are owed according to their own  
4 calculations, rather than relying on the debtor's, and to receive  
5 distributions on an allowed claim under the provisions of a  
6 chapter 13 plan. See, e.g., In re Dumain, 492 B.R. 140, 143  
7 (Bankr. S.D.N.Y. 2013); §§ 501, 502 and 1326(c); Rules 3002 and  
8 3021. Further, by signing the DOT, Brosio agreed that Deutsche  
9 Bank could take reasonable actions to protect its security  
10 interest, particularly if she filed bankruptcy, and that she would  
11 pay Deutsche Bank's reasonable attorney's fees incurred for those  
12 actions. Preparing and filing the POC, reviewing Brosio's plan  
13 and filing a request for special notice, and charging a total of  
14 only \$425.00 in attorney's fees, seems more than reasonable.

15 Because we conclude that the bankruptcy court did not err in  
16 determining Brosio was not the prevailing party, we need not reach  
17 Brosio's second issue about whether it erred in deciding her fees  
18 were not reasonable.

## 19 VI. CONCLUSION

20 Although we have determined on a different legal basis why  
21 Brosio was not the prevailing party under CCC § 1717, because the  
22 bankruptcy court reached this same conclusion, we perceive no  
23 error in this case. Accordingly, we AFFIRM the Fee Order.<sup>8</sup>

24

25

26

---

27 <sup>8</sup> Deutsche Bank contends that Brosio's appeal is frivolous,  
28 and it requests attorney's fees on appeal. We decline to consider  
Deutsche Bank's request because it did not file a separate motion  
as required by Rule 8020. See Rule 8020; Garner v. Shier (In re  
Garner), 246 B.R. 617, 626 n.14 (9th Cir. BAP 2000).