

JUL 31 2014

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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NOT FOR PUBLICATION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 Nos.	CC-13-1513-KuBlPa
	)		CC-13-1514-KuBlPa
JOAN BORSTEN VIDOV and OLEG VIDOV,	)		(related appeals)
	)		
Debtors.	)	Bk. No.	12-22121
	)		
_____	)	Adv. No.	12-01017
SOFIA MARSHAK,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
JOAN BORSTEN VIDOV; OLEG VIDOV,	)		
	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on June 26, 2014  
at Pasadena, California

Filed - July 31, 2014

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

Honorable Maureen A. Tighe, Bankruptcy Judge, Presiding

Appearances: Marc Y. Lazo of Wilson Harvey Browndorf LLP argued  
for appellant Sofia Marshak; Carlos Singer argued  
for appellees Joan Borsten Vidov and Oleg Vidov.

Before: KURTZ, BLUMENSTIEL\*\* and PAPPAS, Bankruptcy Judges.

\*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.

\*\*The Honorable Hannah L. Blumenstiel, Bankruptcy Judge for  
the Northern District of California, sitting by designation.

1 **INTRODUCTION**

2 Sofia Marshak filed a nondischargeability complaint against  
3 debtors Joan Borsten-Vidov and Oleg Vidov under 11 U.S.C.  
4 §§ 523(a)(2)(A) and (a)(6).<sup>1</sup> The bankruptcy court granted  
5 summary judgment against Marshak. After the court entered  
6 judgment, the Vidovs filed two separate motions, one seeking to  
7 recover the attorney's fees they incurred in defending against  
8 the complaint and the other seeking an order pursuant to  
9 Appellate Rule 7 requiring Marshak to post a bond sufficient to  
10 cover their costs and fees on appeal if the Vidovs happened to  
11 prevail on appeal.

12 The bankruptcy court granted both motions, and Marshak  
13 appealed. Because the court's ruling on both motions is based on  
14 the erroneous legal premise that the Vidovs were entitled to  
15 recover their fees in accordance with a contractual fees  
16 provision, we REVERSE.

17 **FACTS**

18 The two appeals disposed of in this decision are related to  
19 two other appeals, both filed by Marshak, from the bankruptcy  
20 court's summary judgment ruling (BAP Nos. CC-13-1421 &  
21 CC-13-1466). In a separate decision filed concurrently herewith,  
22 we have disposed of those summary judgment appeals by affirming  
23 the bankruptcy court. The background leading up to Marshak's  
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25 <sup>1</sup>Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all Rule references are to the Federal Rules of Bankruptcy  
28 Procedure. All Civil Rule references are to the Federal Rules of  
Civil Procedure, and all Appellate Rule references are to the  
Federal Rules of Appellate Procedure.

1 adversary proceeding and the bankruptcy court's summary judgment  
2 ruling is recited in that separate decision.

3 Two weeks after the bankruptcy court entered summary  
4 judgment against Marshak, the Vidovs filed their attorney's fees  
5 motion. The fees motion sought recovery of roughly \$68,000 in  
6 fees and expenses. The Vidovs claimed they were entitled to  
7 recover their fees and expenses under the terms of a settlement  
8 agreement they entered into with Marshak in February 2009.<sup>2</sup> The  
9 settlement agreement provided in relevant part:

10 Attorneys' Fees. Should a lawsuit or arbitration be  
11 commenced to interpret or enforce the terms of this  
12 Agreement, the prevailing party shall be entitled to  
13 recover reasonable costs, reasonable attorney's fees  
and reasonable expenses in addition to any other  
recovery to which the party may be entitled.

14 Settlement Agreement (Feb. 6, 2009) at ¶ 17.7.

15 A few days after they filed their fees motion, the Vidovs  
16 filed their motion asking the bankruptcy court to require Marshak  
17 to post a bond pursuant to Appellate Rule 7.<sup>3</sup> The Vidovs asked

18 \_\_\_\_\_  
19 <sup>2</sup>The Vidovs argued in the alternative that they were  
20 entitled to recover their fees under Rule 9011. The bankruptcy  
21 court did not award the Vidovs their fees on this alternate  
22 ground. On this record, it is apparent that the Vidovs did not  
23 comply with the "safe harbor" requirements set forth in  
24 Rule 9011(c)(1)(A). Absent compliance with these requirements,  
25 it would have been improper for the bankruptcy court to permit  
26 the Vidovs to recover their fees based on Rule 9011. See Barber  
v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998); Polo Bldg. Grp.,  
Inc. v. Rakita (In re Shubov), 253 B.R. 540, 545-46 (9th Cir. BAP

26 <sup>3</sup>Appellate Rule 7 provides in relevant part:

27 In a civil case, the district court may require an  
28 continue...

1 the bankruptcy court to impose a bond requirement sufficient to  
2 cover their anticipated attorney's fees and expenses on appeal in  
3 the estimated amount of \$40,000, as well as to secure payment of  
4 the \$68,000 in fees already incurred in defending against  
5 Marshak's exception to discharge complaint. The Vidovs further  
6 claimed that, in accordance with Appellate Rule 38,<sup>4</sup> the  
7 bankruptcy court should then double the sum of these two amounts  
8 for a total of \$216,000.

9 The imposition of this bond requirement, the Vidovs  
10 contended, was appropriate because of the large amount of  
11 attorney's fees Marshak had forced the Vidovs to incur in  
12 defending against Marshak's meritless litigation. In particular,  
13 the Vidovs pointed to the bankruptcy court's determination in its  
14 summary judgment ruling that Marshak had produced little or no  
15 evidence to support any of her nondischargeability claims.

16 Marshak filed a short response opposing both motions. In  
17 essence, Marshak asserted that both motions should be denied  
18 because the contractual fees provision the Vidovs were relying  
19 upon did not cover either her nondischargeability lawsuit or her  
20 appeal from the summary judgment ruling.

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21  
22 <sup>3</sup>...continue  
23 appellant to file a bond or provide other security in  
24 any form and amount necessary to ensure payment of  
25 costs on appeal.

26 <sup>4</sup>Appellate Rule 38 provides:

27 If a court of appeals determines that an appeal is  
28 frivolous, it may, after a separately filed motion or  
notice from the court and reasonable opportunity to  
respond, award just damages and single or double costs  
to the appellee.

1           The Vidovs then filed a reply, in which they pointed out  
2 that attorney's fees can be included in costs for purposes of  
3 imposing an Appellate Rule 7 bond if there is some applicable  
4 fee-shifting statute making such fees recoverable as costs.  
5 According to the Vidovs, § 1717 of California's Civil Code ("Cal.  
6 Civ. Code § 1717") applied to Marshak's exception to discharge  
7 action and explicitly provided for the taxation of attorney's  
8 fees as costs.<sup>5</sup>

9           The bankruptcy court held a hearing and ruled on each motion  
10 in favor of the Vidovs. Even though Marshak's exception to  
11 discharge complaint alleged claims sounding in fraud and  
12 conversion, the bankruptcy court held that the Vidovs were  
13 entitled to recover their fees in accordance with the settlement  
14 agreement's fee provision because the underlying dispute between  
15 the parties arose out of the settlement agreement and because, in  
16 the court's view, Marshak's grievances could be properly

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17  
18           <sup>5</sup>Cal. Civ. Code § 1717(a) provides in part:

19           **In any action on a contract**, where the contract  
20 specifically provides that attorney's fees and costs,  
21 which are incurred to enforce that contract, shall be  
22 awarded either to one of the parties or to the  
23 prevailing party, then the party who is determined to  
24 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.

25           \* \* \*

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

28 (Emphasis added.)

1 characterized as breach-of-contract type grievances.

2 As for the bond motion, the bankruptcy court held that it  
3 could impose a bond requirement to cover attorney's fees as long  
4 as there was an applicable fee shifting provision permitting the  
5 recovery of fees as costs. The bankruptcy court opined that it  
6 was appropriate in this instance to require Marshak to post a  
7 \$60,000 bond. The bankruptcy court did not identify which fee  
8 shifting statute was applicable, nor did it explain how it  
9 calculated the bond amount.

10 The bankruptcy court also did not identify what specific  
11 criteria it had considered in imposing the bond requirement.  
12 However, it did hold that the bond was necessary in order to  
13 ensure that the Vidovs would not be further harmed in their  
14 reorganization efforts by having to incur additional attorney's  
15 fees defending against Marshak's serious but wholly unsupported  
16 accusations. Furthermore, the court characterized the \$60,000  
17 bond amount as "minor" and stated that Marshak's (or her  
18 counsel's) actions in the litigation had been "very abusive and  
19 harassing."

20 The bankruptcy court signed and filed on October 2, 2013,  
21 "notices of tentative ruling" pursuant to which the bankruptcy  
22 court manifested its intent to fully and finally dispose of both  
23 the fees motion and the bond motion. See Brown v. Wilshire  
24 Credit Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007)  
25 (holding that a bankruptcy court disposition is final for appeal  
26 purposes if it fully adjudicates the issues at bar and clearly  
27 manifests the judge's intent that it be the court's final act in  
28 the matter; Mullen v. Hamlin (In re Hamlin), 465 B.R. 863, 868

1 (9th Cir. BAP 2012) (same). On October 16, 2013, Marshak timely  
2 filed notices of appeal from both orders.

### 3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
5 §§ 1334 and 157(b)(2)(I), and we have appellate jurisdiction  
6 under 28 U.S.C. § 158.

### 7 **ISSUES**

- 8 1. Did the bankruptcy court abuse its discretion in granting  
9 the Vidovs' fees motion?
- 10 2. Did the bankruptcy court abuse its discretion in granting  
11 the Vidovs' bond motion?

### 12 **STANDARDS OF REVIEW**

13 We review the bankruptcy court's determination regarding an  
14 award of attorney's fees for an abuse of discretion. Fry v.  
15 Dinan (In re Dinan), 448 B.R. 775, 783 (9th Cir. BAP 2011). We  
16 similarly review the bankruptcy court's decision to impose a bond  
17 under Appellate Rule 7. See Azizian v. Federated Dep't Stores,  
18 Inc., 499 F.3d 950, 955 (9th Cir. 2007).

19 Under the abuse of discretion standard of review, we first  
20 "determine de novo whether the [bankruptcy] court identified the  
21 correct legal rule to apply to the relief requested." United  
22 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).  
23 And if the bankruptcy court applied the correct legal rule, we  
24 then determine whether the court's factual findings were:  
25 "(1) illogical, (2) implausible, or (3) without support in  
26 inferences that may be drawn from the facts in the record." Id.  
27 (internal quotation marks omitted).

1 **DISCUSSION**

2 Ordinarily, absent an applicable statutory or contractual  
3 provision providing for fees, each litigant must pay their own  
4 attorney's fees regardless of who prevails. Traveler's Cas. &  
5 Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 448  
6 (2007). This is known as the "American Rule" and it applies in  
7 bankruptcy cases. Id. Absent a contrary provision in the  
8 Bankruptcy Code, we look to applicable non-bankruptcy law to  
9 determine whether a prevailing party has any right to recover its  
10 attorney's fees. See id. at 450-51; In re Dinan, 448 B.R. at  
11 785.

12 Here, it is undisputed that the applicable non-bankruptcy  
13 law is California law. California similarly follows the American  
14 Rule. See Santisas v. Goodin, 17 Cal. 4th 599, 607 n.4 (1998).  
15 But California also permits parties to depart from the American  
16 Rule by contractual provision. Id. In California, no less than  
17 three distinct statutes govern contractual fees provisions.  
18 California Code of Civil Procedure § 1021 ("CCP § 1021")  
19 acknowledges the parties' right to contract for the recovery of  
20 attorney's fees. Meanwhile, California Code of Civil Procedure  
21 § 1033.5 ("CCP § 1033.5") dictates that attorney's fees are  
22 treated as an element of costs when a statute or contract  
23 provides for their recovery. And finally, in contract actions,  
24 Cal. Civ. Code § 1717 entitles the prevailing party to recover  
25 its fees based on a contractual fees provision even if that  
26 provision on its face only entitles the other party to the  
27 contract to recover its fees. Santisas, 17 Cal. 4th at 602. In  
28 other words, Cal. Civ. Code § 1717 turns unilateral fees

1 provisions into reciprocal fees provisions by operation of law.

2 Under California law, just because a contract has an  
3 attorney's fees provision does not mean that the prevailing party  
4 in litigation automatically is entitled to recover its fees in  
5 any type of legal action. Rather, the contractual fees provision  
6 must be construed like any other contract term. See Santisas,  
7 17 Cal.4th at 608. Accord, Exxess Electronixx v. Heger Realty  
8 Corp., 64 Cal. App. 4th 698, 708-09 (1998); Patterson v. Rogers  
9 (In re Rogers), 2011 WL 7145722, at \*\*11-12 (9th Cir. BAP 2011).

10 As explained in Santisas, the specific language of the  
11 contractual fees provision typically controls the scope and reach  
12 of the entitlement to recover fees, and that language ordinarily  
13 must be interpreted in accordance with its plain and unambiguous  
14 meaning. Santisas, 17 Cal. 4th at 608.

15 Here, the contractual fees provision upon which the Vidovs  
16 and the bankruptcy court relied is not broad enough to support  
17 the bankruptcy court's fee award. A number of courts already  
18 have held that, under California law, a contractual fees  
19 provision like the one here entitling the prevailing party to  
20 recover fees in an action to "interpret" or "enforce" a contract  
21 does not cover tort claims. See, e.g., Casella v. SouthWest  
22 Dealer Servs., Inc., 157 Cal. App. 4th 1127, 1161-62 (2007);  
23 Redwood Theaters, Inc. v. Davison (In re Davison), 289 B.R. 716,  
24 724-25 (9th Cir. BAP 2003); Exxess Electronixx, 64 Cal. App. 4th  
25 at 708-09 (1998).

26 The bankruptcy court characterized Marshak's exception to  
27 discharge claims as breach of contract claims. We cannot agree  
28 with this characterization. In her nondischargeability action,

1 Marshak alleged several different species of fraud by way of her  
2 § 523(a)(2)(A) claim. As we explained in In re Davison,  
3 § 523(a)(2)(A) fraud claims sound in tort and not in contract  
4 under California law. Id. at 724. The same is true of Marshak's  
5 § 523(a)(6) conversion claim. Section 523(a)(6) claims for  
6 willful and malicious injury sound in tort and not in contract.  
7 See Kawaauhau v. Geiger, 523 U.S. 57, 60-61 (1998) (holding that  
8 § 523(a)(6)'s discharge exception is confined to debts based on  
9 intentional tort); Lockerby v. Sierra, 535 F.3d 1038, 1041 & n.2  
10 (9th Cir. 2008) (stating that tortious conduct is required for  
11 § 523(a)(6) to apply).

12 California law further supports our characterization of  
13 Marshak's § 523(a)(6) conversion claim as a tort claim. In  
14 California, conversion actions may arise from contractual  
15 obligations, but an action for conversion nonetheless still  
16 sounds in tort and not in contract. See Del Bino v. Bailey  
17 (In re Bailey), 197 F.3d 997, 1000-01 (9th Cir. 1999)  
18 (interpreting California law); see also Hillco Inc. v. Stein,  
19 82 Cal. App. 3d 322, 327 (1978) ("It is obvious that the first  
20 two causes of action in the original complaint, namely those for  
21 fraud and conversion, sound only in tort.").

22 If there had been broader language in the settlement  
23 agreement's fees provision, something indicating an entitlement  
24 to recover fees in actions "arising out of" or "related to" the  
25 settlement agreement, then at least some of Marshak's fraud and  
26 conversion allegations may have implicated the fees provision.  
27 See Santisas, 17 Cal. 4th at 608 (holding that fees provision  
28 with "arising out of" language was broad enough to cover both

1 tort and contract claims). For instance, Marshak alleged that  
2 the Vidovs falsely promised in the settlement agreement, with no  
3 intent to perform, the timely payment of certain mortgage debt.  
4 This allegation properly could be characterized as a fraud claim  
5 "arising out of" the contract. However, this allegation is still  
6 fraud-based, sounds in tort, and hence is beyond the scope of the  
7 narrower "interpret" or "enforce" language actually used in the  
8 settlement agreement's fees provision.

9 At bottom, Marshak's exception to discharge claims were all  
10 based on tort, and the fees provision in the settlement agreement  
11 was not broad enough to cover tort claims. Furthermore, the  
12 relevant California statutes (Cal. Civ. Code § 1717, CCP § 1021  
13 and CCP § 1033.5) do not allow the recovery or shifting of fees  
14 absent an explicit statutory or contractual provision. Put  
15 another way, none of these statutes permit a prevailing party to  
16 recover fees incurred in an action that is beyond the scope of  
17 the unambiguous terms of a contractual fees provision.

18 Under these circumstances, the bankruptcy court abused its  
19 discretion by awarding the Vidovs attorney's fees. The  
20 bankruptcy court, as a matter of law, misconstrued the plain  
21 language of the settlement agreement's fees provision. See  
22 United States v. 1.377 Acres of Land, 352 F.3d 1259, 1264 (9th  
23 Cir. 2003) (citing California law and stating that the  
24 interpretation of a contract is a question of law when that  
25 interpretation is based on the clear and explicit language of the  
26 contract itself). This error of law directly led to the  
27 bankruptcy court's erroneous fee award and must be reversed.

28 The bankruptcy court's order requiring Marshak to post a

1 bond suffers from the same legal defect. That order was based on  
2 the same erroneous legal determination that the Vidovs were  
3 entitled under the settlement agreement's fees provision to  
4 recover their attorney's fees. In the absence of applicable  
5 contractual or statutory provisions entitling the appellee to  
6 recover its fees as costs, a bond pursuant to Appellate Rule 7  
7 may not provide for the recovery of attorney's fees. See  
8 Azizian, 499 F.3d at 959-60.

9 The bankruptcy court's bond ruling has a second legal  
10 defect. The bankruptcy court relied on Appellate Rule 7, but  
11 this rule only applies to appeals from a district court to the  
12 court of appeals and only authorizes a district court to order  
13 the posting of such a bond. There is no bankruptcy rule making  
14 Appellate Rule 7 applicable to bankruptcy courts presiding over  
15 adversary proceedings.

16 The bankruptcy court did not identify any legal grounds  
17 authorizing it to invoke Appellate Rule 7 nor are we aware of  
18 any. We have searched for precedent indicating that a bankruptcy  
19 court has authority under Appellate Rule 7 to impose a bond, and  
20 we only found one decision. See In re Miller, 325 B.R. 178, 180  
21 (Bankr. W.D. Ky. 2005). We do not consider In re Miller  
22 persuasive. That decision did not offer any analysis explaining  
23 why a bankruptcy court might be able to apply Appellate Rule 7.  
24 Moreover, In re Miller's application of Appellate Rule 7 seems  
25 inconsistent with Ninth Circuit law. See Vasseli v. Wells Fargo  
26 Bank, N.A. (In re Vasseli), 5 F.3d 351, 353 (9th Cir. 1993).  
27 Vasseli stands for the proposition that an Appellate Rule  
28 authorizing a federal court of appeals to take certain action

1 does not permit the bankruptcy court to take that action. See  
2 id.; see also In re T. R. Acquisition Corp v. Marx Realty &  
3 Improvement Co. (In re T. R. Acquisition Corp.), 1997 WL 528156,  
4 at \*1 n.1 (S.D.N.Y. 1997) (stating that Appellate Rule 7 only  
5 permits the imposition of a bond pending an appeal to the court  
6 of appeals).

7 Based on both of the above-referenced legal defects, the  
8 bankruptcy court's bond order was erroneous and must be reversed.

9 **CONCLUSION**

10 For the reasons set forth above, we REVERSE both the  
11 bankruptcy court's fees order as well as its bond order.