

MAY 20 2015

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-14-1074-JuKuPa
	)	
STEVEN JAMES SAVAGE and	)	Bk. No. 12-28943
ANGELA KATHLEEN SAVAGE,	)	
	)	Adv. No. 12-02513
Debtors.	)	
<hr/>		
STEVEN JAMES SAVAGE,	)	
	)	
Appellant,	)	
	)	
v.	)	M E M O R A N D U M*
	)	
LEONARD BRILL; VICKI BRILL,	)	
	)	
Appellees.	)	
<hr/>		

Argued and Submitted on May 14, 2015  
at Sacramento, California

Filed - May 20, 2015

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

Honorable Christopher M. Klein, Chief Bankruptcy Judge,  
Presiding

Appearances: Jeffrey H. Ochrach of Ochrach Law Group argued  
for appellant Steven James Savage; Kathryn Shubik  
Diemer of Diemer, Whitman & Cardosi, LLP argued  
for appellees Leonard and Vicki Brill.

Before: JURY, KURTZ, 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 8024-1.

1 Appellee Leonard Brill (Brill) filed an adversary  
2 proceeding against chapter 7<sup>1</sup> debtor, Steven James Savage,  
3 seeking a determination that his claim against debtor was  
4 nondischargeable under § 523(a)(2) and (6) and requesting denial  
5 or revocation of debtor's discharge under § 727(a)(2) and (4).<sup>2</sup>  
6 After a trial, the bankruptcy court entered judgment in debtor's  
7 favor on all claims for relief. Debtor then filed a motion  
8 seeking \$65,476.90 in attorneys' fees and costs (Fee Motion),  
9 which the bankruptcy court denied. This appeal followed. We  
10 AFFIRM.

### 11 I. FACTS<sup>3</sup>

12 In June 2009, California Designer Cabinets, Inc. dba Savage  
13 Designer Cabinets (CDC) and Brill entered into a sales agreement  
14 whereby CDC would manufacture custom cabinets for Brill's house.  
15 A dispute arose between Brill and CDC regarding the timing of  
16 constructing the cabinets. As a result, Brill cancelled the  
17

---

18 <sup>1</sup> Unless otherwise indicated, all chapter and section  
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
20 "Rule" references are to the Federal Rules of Bankruptcy  
21 Procedure and "Civil Rule" references are to the Federal Rules of  
22 Civil Procedure.

23 <sup>2</sup> Although Vicki Brill was added as a plaintiff to the  
24 complaint in August 2013, for purposes of simplicity and because  
25 it makes no difference to the result, this memorandum will speak  
26 as if Brill were the sole plaintiff in the adversary proceeding.  
27 For the same reason, we refer to debtor as though he was the sole  
28 debtor.

29 <sup>3</sup> We take judicial notice of various pleadings which were  
30 docketed and imaged by the bankruptcy court in this adversary  
31 proceeding and the underlying bankruptcy case. Atwood v. Chase  
32 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th  
33 Cir. BAP 2003).

1 contract and demanded a refund. When he did not receive one,  
2 Brill sued CDC and Developers Surety and Indemnity Company in  
3 the California state court, asserting causes of action for,  
4 among others, rescission of the contract or, alternatively, for  
5 breach of contract. Debtor was not a named defendant in the  
6 case.<sup>4</sup> Around the same time, CDC stopped all operations and  
7 went out of business. In February 2012, Brill obtained a  
8 default judgment against CDC in the amount of \$134,775.08, which  
9 included his costs and attorneys' fees.

10 A few months later, debtor and his wife filed a joint  
11 chapter 7 petition.

12 In August 2012, Brill filed an adversary complaint against  
13 debtor seeking a determination that his claim against debtor was  
14 nondischargeable under § 523(a)(2) and (6) and requesting denial  
15 or revocation of debtor's discharge under § 727(a)(2) and (4).  
16 As to his § 523(a)(2) and (6) claims for relief, Brill alleged  
17 that debtor committed fraud by representing that he was properly  
18 licensed and able to perform the work he had contracted to do  
19 under the sales agreement. Brill further alleged that debtor  
20 failed to supply the cabinets and install them in a timely  
21 manner and in compliance with California law. Finally, Brill  
22 asserted that debtor's willful and malicious refusal to honor  
23 his contract with Brill caused Brill to suffer significant  
24 damages. In his prayer for relief on these claims, Brill

---

25  
26 <sup>4</sup> It appears that Brill first filed a state court lawsuit  
27 naming CDC and debtor as defendants. Defendants filed a motion  
28 to change venue which the state court granted. Brill then  
dismissed that lawsuit and filed an entirely new case against CDC  
only and removed any claims against debtor personally.

1 requested actual damages "arising from the torts" described,  
2 punitive damages, and costs. As to his § 727(a)(2) and (4)  
3 claims for relief, Brill alleged that debtor failed to properly  
4 describe his assets in his bankruptcy petition, failed to  
5 disclose commission income, and made numerous preferential  
6 transfers to insiders including his father and son prior to  
7 filing the bankruptcy. In his prayer for relief on these  
8 claims, Brill requested revocation of debtor's discharge and  
9 also requested actual damages "arising from the torts" set forth  
10 above, punitive damages, and costs.

11 Debtor filed a motion to dismiss the complaint on the  
12 ground that Brill was not a creditor holding a claim in his  
13 estate because (1) Brill had entered into the underlying  
14 contract with CDC and (2) Brill had obtained a state court  
15 default judgment against CDC. Judge Klein denied the motion  
16 without elaboration.

17 Debtor then answered the complaint with general denials and  
18 asserted numerous affirmative defenses including, among others,  
19 that Brill was not a creditor and had no standing to assert any  
20 claims in debtor's bankruptcy proceeding.

21 The matter was set for trial on November 22, 2013, before  
22 the Honorable David E. Russell. In his trial brief, Brill  
23 argued for denial or revocation of debtor's discharge under  
24 § 727(a)(2) and (4). In a footnote, Brill stated that he did  
25 not intend to pursue the § 523(a) claims at trial. Therefore,  
26 no arguments related to those claims. In a three-page trial  
27 brief, debtor asserted that Brill's purported dismissal of the  
28

1 § 523(a) claims was ineffective.<sup>5</sup>

2 At trial, debtor's counsel argued again that Brill was not  
3 a creditor in debtor's estate because Brill had entered into the  
4 contract with CDC. According to debtor's counsel, if Brill was  
5 not a creditor, then he did not have the right to assert a § 727  
6 claim. Counsel further asserted that Brill had obtained a  
7 default judgment against CDC for the underlying debt and was now  
8 asserting the same claims against him.

9 Brill's counsel argued that debtor had made a "judicial  
10 admission" in his schedules that Brill was a creditor. Counsel  
11 also requested that she be allowed to amend the complaint to  
12 include alter ego allegations if the complaint did not already  
13 include them - which it did not. Judge Russell was not  
14 persuaded by her judicial admission argument and declined to  
15 allow any further amendments to the complaint.

16 Judge Russell proceeded with the trial and heard testimony  
17 from debtor. Brill's counsel questioned debtor about various  
18 omissions from his schedules and the transfer of certain assets.  
19 There was no evidence presented on the § 523 claims during  
20 trial. At the close of Brill's case on the § 727 claims for  
21 relief, debtor's counsel moved for judgment in debtor's favor  
22 under Civil Rule 52,<sup>6</sup> on the grounds that Brill was not a  
23

---

24 <sup>5</sup> Cal. Civil Code § 1717(b)(2) provides: "Where an action  
25 has been voluntarily dismissed . . ., there shall be no  
26 prevailing party for purposes of this section." Debtor implied  
27 that Brill may have attempted to dismiss the § 523 claims to  
avoid the payment of any attorneys' fees.

28 <sup>6</sup> Civil Rule 52 is made applicable to bankruptcy proceedings  
by Rule 7052.

1 creditor with standing to assert the claims and there was no  
2 evidence to support the claims.

3       Apparently ruling on the motion, Judge Russell placed his  
4 findings of fact and conclusions of law on the record. First,  
5 he concluded that Brill was not a creditor. Next, Judge Russell  
6 ruled on the § 727 claims and found that, although debtor had  
7 omitted an asset from his schedules, it was a mistake. He also  
8 found debtor's testimony was straightforward and non-evasive.  
9 Judge Russell concluded that debtor was honest and thus there  
10 was no basis to deny his discharge. Finally, Judge Russell  
11 noted that the adversary complaint included a § 523(a)(2) claim  
12 for relief, but no evidence was presented on that claim.  
13 Therefore, he decided to enter judgment in favor of debtor on  
14 the §§ 523(a)(2) claim<sup>7</sup> and 727(a) claim. On November 28, 2013,  
15 the bankruptcy court entered a Civil Minute Order granting  
16 judgment in debtor's favor.

17       Once the judgment became final, debtor filed the Fee Motion  
18 seeking \$65,476.90 in attorneys' fees and costs. Relying on the  
19 underlying contract between Brill and CDC and Cal. Civ. Code  
20 (CC) § 1717(a), debtor argued that he was entitled to recover  
21 attorneys' fees since Brill's claims were based "on the  
22 contract." Debtor maintained that Brill's responses to  
23 discovery showed that the claims he alleged in the adversary  
24 complaint arose out of the CDC contract. When asked what acts  
25 debtor committed that formed the basis for the claims alleged in  
26

---

27  
28 <sup>7</sup> The bankruptcy court did not specifically refer to the  
§ 523(a)(6) claim.

1 the adversary complaint, Brill stated: "Defendant failed to  
2 commence and continue, and suspended and abandoned work on the  
3 Brill Home in violation of the Sales Agreement and California  
4 law. Defendant willfully and maliciously refused to honor his  
5 contract with Plaintiff." Finally, debtor argued that the  
6 underlying litigation need not necessarily be for breach of  
7 contract. Citing Marsu, V.V. v. Walt Disney Co., 185 F.3d 932,  
8 939 (9th Cir. 1999), debtor asserted that even an action  
9 "sounding in tort" may trigger the right to a contractual  
10 attorney fees recovery if the fee provision is broadly worded.

11 Brill opposed the Fee Motion, contending that the claims  
12 for relief in the adversary complaint were based on the  
13 nondischargeability provisions and not on breach of contract.

14 On February 4, 2014, Judge Klein heard the parties'  
15 arguments on the Fee Motion. At the continued February 18, 2014  
16 hearing on the matter, Judge Klein placed his findings of fact  
17 and conclusions of law on the record. Citing Redwood Theaters,  
18 Inc. v. Davison (In re Davison), 289 B.R. 716 (9th Cir. BAP  
19 2003) and Santisas v. Goodin, 951 P.2d 399 (Cal. 1998), the  
20 bankruptcy court found that the adversary proceeding was  
21 fundamentally a tort action and not covered by CC § 1717. The  
22 bankruptcy court denied the Fee Motion by entering a Civil  
23 Minute Order on February 18, 2014. Debtor timely appealed.

## 24 II. JURISDICTION

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
26 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.  
27 § 158.



1 party unless specifically allowed by contract or statute.  
2 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240,  
3 257-58 (1975); In re Baroff, 105 F.3d at 441. In a  
4 nondischargeability action, attorney fees can be included if the  
5 fees are recoverable under a state statute. Bertola v. N. Wis.  
6 Prod. Co. (In re Bertola), 317 B.R. 95, 99-100 (9th Cir. BAP  
7 2004). In claiming an entitlement to attorneys' fees in this  
8 litigation, debtor relies on the attorney fee provision in the  
9 contract between CDC and Brill, CC § 1717, and Cal. Code Civ. P.  
10 (CCP) § 1021.<sup>8</sup> We apply California law to determine whether  
11 debtor was entitled to his attorneys' fees.

12 The contractual attorney fee provision provides in relevant  
13 part:

14 In the event of any form of breach of contract or  
15 threatened breach of this agreement resulting in legal  
16 expenses, whether incident to litigation or not, the  
17 buyer shall be responsible for all reasonable  
18 attorneys fees and expenses incurred. . . .

19 CC § 1717 states in relevant part:

20 (a) In any action on a contract, where the contract  
21 specifically provides that attorney's fees and costs,  
22 which are incurred to enforce that contract, shall be  
23 awarded either to one of the parties or to the  
24 prevailing party, then the party who is determined to  
25 be the party prevailing on the contract, whether he or  
26 she is the party specified in the contract or not,  
27 shall be entitled to reasonable attorney's fees in  
28 addition to other costs.

. . . .

CCP § 1021 provides in relevant part:

Except as attorney's fees are specifically provided  
for by statute, the measure and mode of compensation

---

<sup>8</sup> Debtor never cited CCP § 1021 as a basis for his  
attorneys' fees in the bankruptcy court.

1 of attorneys and counselors at law is left to the  
2 agreement, express or implied, of the parties . . . .

3 **A. CC § 1717 Does Not Apply To This Case Because Brill Would**  
4 **Not Have Been Entitled To Attorneys' Fees In This**  
5 **Adversary.**

6 CC § 1717 allows a party or nonparty to recover attorneys'  
7 fees incurred in the litigation of a contract claim. See  
8 Hosseini v. Key Bank (In re Hosseini), 504 B.R. 558, 567-68 (9th  
9 Cir. BAP 2014); In re Davison, 289 B.R. at 726 (citing Santisas,  
10 17 Cal.4th 599, 615 (1998)). The legislature's goal in enacting  
11 this section was to ensure the mutuality of an attorneys' fees  
12 remedy in contractual attorney fees provisions. Santisas,  
13 17 Cal.4th at 610; Hsu v. Abbara, 9 Cal.4th 863, 870-71 (Cal.  
14 1995). There are two aspects to this mutuality: (1) an  
15 attorneys' fee provision entitling only one party to fees must  
16 be interpreted to allow fees to whichever party prevails; and  
17 (2) a nonsignatory sued under the contract may recover  
18 attorneys' fees just as a signatory would, under certain  
19 circumstances. Santisas, 17 Cal.4th at 610-611. Debtor's focus  
20 in this appeal is on the second mutuality requirement since he  
21 was not a signatory to the contract.

22 Undoubtedly if Brill had tried to hold debtor liable for  
23 CDC's debt under an alter ego theory in the state court  
24 litigation, debtor could have made a claim for attorneys' fees  
25 if he had prevailed. The California Supreme Court decided the  
26 question in Reynolds Metals Co. v. Alperson, 25 Cal.3d 124 (Cal.  
27 1979), a collection case in which a creditor sued two individual  
28 shareholders of a bankrupt corporation as its alter egos. The  
shareholders prevailed, and the court found they were entitled

1 to fees under attorney fee provisions in the notes. "Had  
2 plaintiff prevailed on its cause of action claiming defendants  
3 were in fact the alter egos of the corporation . . . ,  
4 defendants would have been liable on the notes. Since they  
5 would have been liable for attorney's fees pursuant to the fee  
6 provision had plaintiff prevailed, they may recover attorney's  
7 fees pursuant to [CC] section 1717 now that they have  
8 prevailed." Id. at 129. However the question before us is  
9 different. Brill did not sue debtor in the state court under an  
10 alter ego theory and did not assert an alter ego claim against  
11 debtor in this adversary. Indeed, the bankruptcy court denied a  
12 request by Brill's counsel for amendment of the complaint to  
13 include such a claim. Moreover, assertion of an alter ego claim  
14 provides a contractual remedy against a non-party to a contract.  
15 This was not an action for breach of contract but about a  
16 debtor's right to a discharge. Therefore, Reynolds has no  
17 application to these facts.

18 Putting Reynolds aside, debtor's entitlement to recover  
19 fees under the contract would exist purely by virtue of the  
20 mutuality provisions under CC § 1717; that is, he would be  
21 entitled to recover fees against Brill only because Brill would  
22 have been entitled to recover fees against him had Brill  
23 succeeded in the adversary proceeding. Under California's  
24 merger doctrine, the entry of the judgment extinguished all  
25 contractual rights Brill had under the terms of the contract  
26 between CDC and Brill, including the right to attorneys' fees.  
27 Hambrose Reserve, Ltd. v. Faitz, 9 Cal.App.4th 129 (Cal. Ct.  
28 App. 1992) ("Once there is a judgment, contractual rights are

1 merged into and extinguished by the terms of the judgment. At  
2 that point there is no subsisting contractual attorney fee  
3 provision on which [CC] section 1717 may operate.”); Chelios v.  
4 Kaye, 219 Cal.App.3d 75, 80 (Cal. Ct. App. 1990) (“When . . . a  
5 lawsuit on a contractual claim has been reduced to a final,  
6 nonappealable judgment, all of the prior contractual rights are  
7 merged into and extinguished by the monetary judgment, and  
8 thereafter the prevailing party has **only** those rights as set  
9 forth in the judgment itself.” (Emphasis added). Accordingly,  
10 because the contract was extinguished, Brill could not have  
11 invoked the contractual fee clause to recover his fees in this  
12 adversary proceeding under either the § 523 or the § 727 claims.

13 For all these reasons, the mutuality provisions under  
14 CC § 1717 do not extend to debtor.

15 **B. The Litigation Was Not An Action “On The Contract” As**  
16 **Required Under CC § 1717(a).**

17 We agree with Judge Klein that Brill’s § 523 claims for  
18 relief were tort-based claims not covered by CC § 1717. The  
19 title of the cause of action is of secondary importance to the  
20 nature of the parties’ assertions in applying CC § 1717(a).  
21 In re Baroff, 105 F.3d at 443. Also, “[i]n determining whether  
22 an action is ‘on the contract’ under [CC §] 1717, the proper  
23 focus is not on the nature of the remedy, but on the basis of  
24 the cause of action.” In re Tobacco Cases I, 193 Cal.App.4th  
25 1591, 1602 (Cal. Ct. App. 2011). Applying these principles,  
26 Brill’s factual allegations against debtor under the § 523(a)(2)  
27 and (6) claims for relief were based on debtor’s own fraud and  
28 conduct and did not implicate contract principles. Thus, the

1 bankruptcy court committed no error by applying the holdings of  
2 Davison and Santisas to this case – the creditor’s action must  
3 have been brought to enforce its rights under the agreement.  
4 Santisas, 951 P.2d at 409 (tort claims are “outside the ambit of  
5 section 1717”); Davison, 289 B.R. at 724 (attorneys’ fees for  
6 tort claims are not recoverable under CC § 1717); see also  
7 In re Baroff, 105 F.3d at 443 (“Under California law, a tort  
8 action for fraud arising out of a contract is not an action on a  
9 contract within the meaning of [CC] § 1717.”).

10 In addition, debtor’s argument that Brill’s adversary  
11 complaint was an action based “on the contract” centers on the  
12 threshold issue of Brill’s creditor status and standing to bring  
13 the §§ 523 and 727 claims. However, Brill’s creditor status and  
14 legal standing in the adversary proceeding was a pure question  
15 of law, the answer to which did not depend upon contract  
16 principles. Generally, California law treats a corporation as  
17 an entity separate and distinct from its shareholders, officers  
18 and directors. Communist Party v. 522 Valencia, Inc.,  
19 35 Cal.App.4th 980, 993 (Cal. Ct. App. 1995). Under ordinary  
20 circumstances, shareholders do not incur personal liability for  
21 the corporation’s actions during its existence. They are not  
22 personally liable for the corporation’s debts or its torts.  
23 Bing Crosby Minute Maid Corp. v. Eaton, 46 Cal.2d 484, 487 (Cal.  
24 1956). In applying this law, Judge Russell was not called upon  
25 to make any determination regarding the parties’ contract other  
26 than noting that the underlying contract was between Brill and  
27 CDC. Under the authorities cited above, it followed that Brill  
28 was not a creditor with a claim in debtor’s estate.

1 Finally, the trial conducted before Judge Russell was only  
2 on Brill's § 727 claims for relief since Brill had abandoned his  
3 § 523 claims prior to trial. In refusing to deny debtor's  
4 discharge under § 727, Judge Russell did not rely on the  
5 contract or even discuss it. Instead, the court heard debtor's  
6 testimony, found him honest, and concluded there was no basis to  
7 deny debtor his discharge. Notably, debtor has cited no case  
8 law which holds that § 727 claims are actions "on a contract"  
9 when such claims are successfully defended. See Tuloil, Inc. v.  
10 Shahid (In re Shahid), 254 B.R. 40, 44-45 (10th Cir. BAP 2000)  
11 (concluding § 727 does not provide a statutory basis for an  
12 award of attorneys' fees, and that the attorney fee clause in  
13 creditor's contract with debtor was inapplicable because an  
14 action under § 727 was not an action on the contract). The  
15 Panel was also unable to find any Ninth Circuit case where a  
16 prevailing creditor in a § 727 action was awarded attorneys'  
17 fees on any provision.

18 For all these reasons, debtor's reliance on Win v. Tran  
19 (In re Tran), 301 B.R. 576, 583 (Bankr. S.D. Cal. 2003) misses  
20 the mark. In Tran, the bankruptcy court noted that the trial  
21 had proceeded as a breach of contract claim. The record does  
22 not support such a finding under the facts of this case.

23 **C. Debtor's CCP § 1021 Argument Has Been Waived.**

24 Debtor also argues that Judge Klein erred by not  
25 considering whether the attorney fee provision in the contract  
26 was broadly worded to cover actions sounding in tort as well as  
27 contract. "We apply a general rule against entertaining  
28 arguments on appeal that were not presented or developed before

1 the [bankruptcy] court.” Davis v. Elect. Arts Inc., 775 F.3d  
2 1172, 1180 (9th Cir. 2015). Debtor’s Fee Motion did not mention  
3 CCP § 1021 and debtor’s counsel never argued before Judge Klein  
4 that CCP § 1021 was applicable to the attorney fee provision in  
5 the contract. Accordingly, debtor’s argument about the  
6 applicability of CCP § 1021 to the attorney fee provision is  
7 deemed waived.

8 We have recognized three circumstances in which we have  
9 discretion to reach waived issues, including “when the issue  
10 presented is purely one of law and either does not depend on the  
11 factual record developed below, or the pertinent record has been  
12 fully developed.” Id. Under the circumstances of this case,  
13 whether the attorney fee provision is broad enough to cover  
14 fraud and other torts is a question of law that we can address  
15 on the existing record. See United States v. 1.377 Acres of  
16 Land, 352 F.3d 1259, 1264 (9th Cir. 2003) (the interpretation of  
17 language in a contract is a question of law reviewed de novo).  
18 We therefore exercise our discretion to address the issue.

19 Although debtor suggests we interpret the attorney fee  
20 provision broadly to cover all disputes arising out of the  
21 contract, we decline to do so. On its face, the express  
22 language of the attorney fee provision limits recovery of  
23 attorneys’ fees to actions relating to breach of the contract.  
24 The narrow language employed cannot be construed to cover all  
25 actions “resulting from” the agreement as debtor argues. Also,  
26 neither the § 523 claims nor the § 727 claims were “disputes  
27 arising from the contract” between Brill and CDC.  
28 Accordingly, CCP § 1021 is of no help to debtor under these

1 circumstances.

2 **VI. CONCLUSION**

3 Having found no error, we AFFIRM.

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