



**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION**

In re:

CHAPTER 7

Jordan Wank

Case No.: 1:12-bk-11628-MT  
Adv No: 1:12-ap-01156-MT

Debtor(s).

A & S Investment, LLC, Mark Ferguson,  
Daniel Gordon, Basil Samona, Athar  
Siddiqui, George Tsoupakis

**MEMORANDUM OF DECISION RE (1)  
APPLICATION FOR COMPENSATION FOR  
PAYMENT OF FEES AND/OR EXPENSES  
FILED BY WILLIAM H. SCHULTZ; AND (2)  
MOTION FOR ATTORNEY'S FEES FILED  
BY LINCOLN QUINTANA**

Plaintiff(s),

v.

Jordan Wank, Bruce Wank, Toby Wank

Defendant(s).

Date: March 11, 2015  
Time: 11:00 a.m.  
Courtroom: 302

In this adversary proceeding, Plaintiffs Daniel Gordon, Basil Samona, A & S Investments, LLC, Athar Siddiqui, Mark Ferguson, and George Tsoupakis ("Plaintiffs") sought a judgment finding that the Stipulated Judgment entered on June 18, 2010 in Los Angeles Superior Court was excepted from discharge under 11 U.S.C. §523 (a) (2, 4, 6 and 19). The complaint was later amended on May 18, 2012 (the "FAC"). As part of the settlement that led to the entry of the Stipulated Judgment (the "Settlement Agreement"), Jordan Wank ("Defendant" or "Wank") signed a Declaration ("First

1 Declaration"), which purported to set forth "facts" demonstrating that Plaintiffs had relied  
2 upon representations made by Wank regarding their investments. Defendant later  
3 disavowed the First Declaration

4 On December 31, 2012, Plaintiffs filed their initial motion for summary judgment  
5 in this adversary proceeding (doc. 15). The motion was based entirely on the First  
6 Declaration, and the Court granted the motion. Defendant appealed. On January 29,  
7 2014, the Bankruptcy Appeal Panel (the BAP) reversed the ruling granting the motion,  
8 and ruled that there was insufficient evidence of the facts which Plaintiffs alleged as the  
9 basis for the motion for the Court to have determined that there was no genuine issue of  
10 material fact (the "Remand," doc. 32).

11 After the Remand, Plaintiffs filed a second Motion for Summary Judgment on  
12 June 6, 2014 (the Second MSJ", doc. 61). This motion was essential identical to the first  
13 motion and was also based on the First Declaration. Wank opposed Second MSJ. On  
14 October 14, 2014, the Second MSJ was later withdrawn under the "safe harbor"  
15 provision of FRBP 9011(c)(1)(A).

16 On August 13, 2014, a FRCP Rule 41 (a)(2) Motion to Dismiss was filed by  
17 Plaintiffs (doc.84), which Wank opposed. On January 7, 2015, the Court heard and  
18 granted the Motion to Dismiss. Thereafter, its Order dismissing the action with prejudice  
19 was filed and served (doc. 105).

20 Defendant now moves for an award for all of his attorney's fees and costs  
21 incurred throughout the entire litigation for his counsel William Schultz and Lincoln  
22 Quintana (the "Schultz Fee Motion," doc. no. 117 and the "Quintana Fee Motion," doc.  
23 no. 107 & 108, and together the "Attorney's Fee Motions"). Defendant seeks attorney's  
24 fees of \$66,630 .55 and sanctions of \$150,000.

25 Attorney's fees per contract to prevailing party under Civil Code § 1717

26 Attorneys' fees may be awarded and declared nondischargeable in an action to  
27 determine dischargeability of debt. Cohen v. De La Cruz, 523 U.S. 213, 223 (1998).  
28 Before attorneys' fees are awarded, however, two requirements must be met: (1) an  
underlying contract or nonbankruptcy law must provide a right to recover attorneys'  
fees, and (2) the issues litigated in the dischargeability action must fall within the scope  
of the contractual or statutory attorneys' fees provision. See Fry v. Dinan (In re Dinan),  
448 B.R. 775, 785 (9th Cir. BAP 2011) ("under Cohen, the determinative question for  
awarding attorneys' fees is whether the creditor would be able to recover the fee outside  
of bankruptcy under state or federal law").

California Civil Code § 1717 provides a basis for a party to recover attorney's fees  
incurred in litigation of a contract claim. It provides, in relevant part:

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

1 whether he or she is the party specified in the contract or not, shall be  
2 entitled to reasonable attorney's fees in addition to other costs. . . .  
3 Reasonable attorney's fees shall be fixed by the court, and shall be an  
4 element of the costs of suit.

5 (b)(1) The court, upon notice and motion by a party, shall determine who  
6 is the party prevailing on the contract for purposes of this section, whether  
7 or not the suit proceeds to final judgment. Except as provided in  
8 paragraph (2), the party prevailing on the contract shall be the party who  
9 recovered a greater relief in the action on the contract. The court may also  
10 determine that there is no party prevailing on the contract for purposes of  
11 this section.

12 Cal. Civ. Code § 1717(a), (b)(1).

13 Attorney's fees awarded under Cal. Civ. Code § 1717 are specifically allowed as  
14 a recoverable cost under CCP §§ 1032 and 1033.5. CCP § 1033.5(c)(5). Cal. Civ.  
15 Code § 1717 creates a reciprocal right to recover attorney's fees as costs in a dispute  
16 over a contract containing an attorney fee clause, regardless of whether the attorney fee  
17 clause provision in the contract would have allowed for reciprocal recovery. Santisas v.  
18 Goodin, 17 Cal. 4th 599, 610-11 (Cal. 1998).

19 *Is there a prevailing party?*

20 Defendant's argues that an award of attorney's fees is appropriate because he is  
21 the prevailing party, as Plaintiffs' voluntarily dismissed the FAC after the BAP vacated a  
22 summary judgment ruling in their favor and remanded the matter for further  
23 proceedings. Why the dischargeability action was dismissed probably cannot be  
24 determined with complete clarity as this action and the fraudulent transfer action must  
25 be viewed in tandem.

26 The determination of "prevailing party" for the purpose of reciprocal attorney's  
27 fees in California is guided by the California Supreme Court's decision in Hsu v. Abbara,  
28 9 Cal. 4th 863 (Cal. 1995):

Accordingly, we hold that in deciding whether there is a "party prevailing  
on the contract," the trial court is to compare the relief awarded on the  
contract claim or claims with the parties' demands on those same claims  
and their litigation objectives as disclosed by the 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].

Hsu, 9 Cal. 4th at 876.

If the Court compares the relief awarded on the FAC, (i.e., a determination that  
the debt from the Stipulated Judgment is non-dischargeable), with the final resolution of

1 just this case, (i.e., a dismissal under FRCP 41(a)(2)), Defendant did obtain his litigation  
2 objective in one respect -- a defeat of the dischargeability action so as to obtain his  
3 discharge in this chapter 7 case. Plaintiffs dismissal of the FAC was, however, to focus  
4 their attention on a related adversary wherein they are also plaintiffs along with the  
5 Chapter 7 Trustee, 1:12-ap-01154 (the "Trustee Adversary"). The Trustee Adversary  
6 seeks a judgment setting aside and recovering alleged fraudulent transfers made by  
7 Defendant. The two cases must be viewed as a whole - the Plaintiffs do not seek  
8 simply to obtain an empty judgment denying discharge. Plaintiffs seek to recover funds  
9 to satisfy the original wrong.

10 *"In determining litigation success, courts should respect substance rather than*  
11 *form, and to this extent should be guided by 'equitable considerations.' For example, a*  
12 *party who is denied direct relief on a claim may nonetheless be found to be a prevailing*  
13 *party if it is clear that the party has otherwise achieved its main litigation objective." Hsu*  
14 *v. Abbara, 9 Cal. 4th at 877 (citations omitted)(emphasis in original). The Trustee*  
15 *Adversary, which has now been settled, does not seek a determination of*  
16 *dischargeability. Presumably, while Defendant obtained his discharge in this*  
17 *bankruptcy, Plaintiffs have also achieved their objective -- to recover something for their*  
18 *troubles. Thus, it is rather difficult to say that as a practical matter, Defendant really can*  
19 *be considered a prevailing party. Even if Defendant were technically to be considered*  
20 *the prevailing party in the discharge action, as defined by Cal. Civ. Code § 1717(a), he*  
21 *would not be entitled to an award of attorney's fees because Defendant's attorney's*  
22 *fees in this action were not incurred to enforce the Settlement Agreement.*

23 *Defendant does not have a contractual right to attorney's fees because the*  
24 *Complaint Sought a Determination of Dischargeability, not an Enforcement of the*  
25 *Settlement*

26 The Settlement Agreement, which resolved the underlying Superior Court case,  
27 authorized attorney's fees "[i]f there is litigation or a request that the Court enforce any  
28 of the terms of this Agreement, and/or performance hereunder, the prevailing Party shall  
recover reasonable attorney's fees and costs incurred in that litigation under California  
Civil Code Section 1717." Schultz Fee Motion, 3:23-26. Defendant argues that the  
Settlement Agreement resolved the underlying LASC litigation and ended up forming  
the basis for this adversary proceeding.

Plaintiffs, on the other hand, contend that the FAC was brought to determine  
dischargeability of the debt for the Stipulated Judgment. Plaintiffs note that the  
Settlement Agreement was never included as an exhibit to either the original complaint  
or the FAC, because they did not allege violations of the Settlement Agreement in the  
FAC. Plaintiffs cite to In re Fulwiler to support their argument that even if the Settlement  
Agreement is characterized as part of the facts that were sued upon, Defendant's claim  
is barred. (Grove v. Fulwiler) In re Fulwiler, 624 F.2d 908 (9th Cir. 1980) (holding that  
attorney's fees were awardable to successful debtors under § 17(a)(2) of the  
Bankruptcy Act of 1898 only where the creditor brought the proceeding in bad faith or to  
harass the debtor).

1 Defendant argues in reply that the Stipulated Judgment was entered *pursuant to*  
2 *the Settlement Agreement*, and that Plaintiffs reliance on Fulwiler is misplaced, given  
3 that its progeny make clear that fees may be awarded to a prevailing party on a  
4 dischargeability action if the underlying contract or nonbankruptcy law provides such a  
5 right to recover. Specifically, Defendant focuses on In re Saccheri as supportive of his  
6 position. Saccheri v. St. Lawrence Dairy (In re Saccheri), 2012 Bankr. LEXIS 5140  
7 (B.A.P. 9th Cir., Nov. 1, 2012).

8 In Saccheri, the debtor, a former attorney, procured investments from friends and  
9 clients to buy a dairy farm. Saccheri, 2012 Bankr. LEXIS 5140 at \*2. The debtor then  
10 made unauthorized use of the farm's funds and borrowed against the property for his  
11 own benefit. Id. at \*3. After he was discovered, the parties entered into a settlement  
12 agreement, where the debtor agreed to pay attorney's fees incurred in enforcing the  
13 agreement against him. Id. at \*5-\*6. The debtor then filed bankruptcy instead of paying  
14 the settlement. Id. at \*6. The bankruptcy court awarded damages and held the debt  
15 nondischargeable as both fraudulent and as incurred in breach of fiduciary duty. It also  
16 awarded attorneys' fees pursuant to the settlement agreement and Cal. Code Civ. P.  
17 § 1021. Id. at \*8-\*9. In reversing the award of attorneys' fees on appeal, the BAP  
18 stated:

19 In the bankruptcy court, the Dairy asserted that the "present issue before  
20 the court is simply the enforcement of the subject Settlement Agreement.  
21 In such matters, attorney's fees are permissible." The Dairy distinguished  
22 the cases of In re Fulwiler, 624 F.2d 908, and In re Bonnifield, 154 B.R.  
23 743, contending that in those cases "dischargeability was at issue" and  
24 not the enforcement of a Settlement Agreement. *Exactly*. The Dairy's  
25 claims in the nondischargeability proceeding were not brought to enforce  
26 the terms of the agreement or to pursue a breach. The Dairy did not plead  
27 that Debtor was liable under the Settlement Agreement nor did it litigate  
28 that Debtor had breached the agreement. Rather, the action pursued the  
remedy of nondischargeability based on the tort claims of fraud, breach of  
fiduciary duty and embezzlement for purposes of § 523(a)(2)(A) and  
(a)(4).

21 In re Saccheri, 2012 Bankr. LEXIS 5140 at \*39 (emphasis added).

22 The BAP's reasoning in Saccheri is persuasive and totally on point on the  
23 question of whether Settlement Agreement was at issue in the FAC. The Settlement  
24 Agreement was simply not at issue in this court. The facts alleged, relief requested in  
25 the FAC, did not refer in any operative manner to the breach of the Settlement  
26 Agreement. The FAC was focused on defeating Defendant's right to discharge the debt  
27 created by the Stipulated judgment.

26 In Saccheri, the BAP also considered that, "the attorneys' fees clause was in an  
27 agreement that was not even in existence at the time the acts which led to  
28 nondischargeability occurred. The adversary proceeding concerned those acts, not the  
Settlement Agreement." In Saccheri, the debtor was alleged to have improperly taken  
funds between 2005 and 2007, and the settlement agreement was executed in 2008.

1 Id. at \*3-\*5. The same is true here. The FAC was premised on the actions described in  
2 the First Declaration, which described alleged actions that Wank engaged in sometime  
3 in late summer and fall of 2004. First Declaration, 1:17-18. The Settlement Agreement,  
4 with its attendant attorney's fee provision, was not executed until 2009. Therefore, the  
5 attorneys' fee clause in the Settlement Agreement was inapplicable to the claims  
6 litigated. Defendant is not entitled to an award of attorney's fees under Cal. Civ.  
7 Code § 1717.

8 Attorney's fees under 11 U.S.C. § 523(d)

9 11 U.S.C §523 (d) provides as follows:

10 If a creditor requests a determination of dischargeability of a consumer  
11 debt under subsection (a)(2) of this section, and such debt is discharged,  
12 the court shall grant judgment in favor of the debtor for the costs of, and a  
13 reasonable attorney's fee for, the proceeding if the court finds that the  
14 position of the creditor was not substantially justified, except that the court  
15 shall not award such costs and fees if special circumstances would make  
16 the award unjust.

17 11 U.S.C. 101(a)(8) defines "consumer debt" as a "debt incurred by an individual  
18 primarily for a personal, family, or household purpose."

19 Debts incurred in the production of income or to fund a business are not  
20 consumer debts. In re SFW Inc., 18 C.B.C.2d 584, 83 B.R. 27 (Bankr. S.D. Cal. 1988).  
21 Collier on Bankruptcy notes that some courts, including two courts of appeals, have  
22 adopted the "profit motive" test used in several Truth in Lending cases. 2-101 Collier on  
23 Bankruptcy P 101.08 (16<sup>th</sup> ed.). Under the "profit motive" test, a debt is not a consumer  
24 debt if it "was incurred with an eye toward profit." Defendant argues in reply that he was  
25 not acting as an investment professional when he incurred this debt, so the debt is a  
26 consumer debt. Defendant admitted in his Answer to the Complaint that Plaintiffs wired  
27 funds to him for investment in EIS, and he then wired those same funds to a party in  
28 London for investment in EIS. FAC, ¶ 15; Answer to Complaint, ¶ 1.

Even if the Court were to go so far as to construe Defendant's actions as not  
having been done with a "profit motive," the fact that a debt was not incurred with a  
profit motive, however, does not make it a consumer debt if it was not incurred for  
personal, family or household purposes. There are no facts in the record that would  
lead the Court to reasonably infer that this debt was incurred for a personal or family  
purposes. Defendant is not entitled to attorney's fees under § 523(d).

Attorney's fees and Sanctions under 105(a) and FRBP 9011(b)

Defendant argues that the conduct of Plaintiffs' counsel was so egregious that  
monetary sanctions should be imposed to Plaintiffs' counsel to serve as deterrent to  
such actions in the future. First of all, this Court has never found Plaintiff's actions to be  
egregious or baseless. Wank seeks also monetary sanctions in an appropriate sum to  
compensate him for the needless costs and fees he incurred defending the litigation.

1 Plaintiffs correctly argue that Defendant did not follow the proper procedure for  
2 sanctions under FRBP 9011, in that there has not been a properly noticed motion for  
3 sanctions under FRBP 9011. The only time Defendant has availed himself of the  
4 sanctions procedure of FRBP 9011 was when Plaintiffs filed the Second MSJ. In that  
5 instance, Plaintiffs withdrew the "challenged paper" within the time provided under the  
6 "safe harbor" provision of FRBP 9011(c)(1)(A). Defendant is not entitled to attorney's  
7 fees as a sanction under FRBP 9011 and § 105(a).

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25 The Attorney's Fee Motions are denied.

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Date: May 14, 2015

  
Maureen A. Tighe  
United States Bankruptcy Judge