



IT IS SO ORDERED.  
Signed April 21, 2015

*Arthur S. Weissbrodt*

Arthur S. Weissbrodt  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	]	Case No. 13-55547-ASW
	]	
JACQUELINE GIUSTO,	]	Chapter 13
	]	
Debtor.	]	

**MEMORANDUM DECISION RE: MOTION FOR ATTORNEY'S FEES**

Before the Court is the motion of Debtor Jacqueline Giusto ("Debtor") for recovery of attorney's fees under Cal. Civ. Code § 1717 ("CCC § 1717") as the prevailing party in litigation of Green Tree Servicing LCC's ("Green Tree") motion for relief from the automatic stay. Debtor is represented by attorney Jim Erickson. Green Tree is represented by attorney Nathan Smith. For the reasons explained below, the motion is granted.

**I. FACTS**

Debtor filed a chapter 13 bankruptcy case on October 21, 2013.<sup>1</sup> Listed on Schedule A was the real property located at 3971 Arbuckle Drive, San Jose, California (the "Property"). Debtor's

<sup>1</sup>Debtor's plan was confirmed on January 15, 2015.

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1 Schedule D states that Debtor is not listed on the mortgage, the  
2 mortgage is currently in Debtor's deceased grandmother's name, and  
3 that Debtor has been making the mortgage payments for the past  
4 decade.

5 In June 2001, Debtor's grandmother, Maddelena E. Giusto,  
6 executed a note ("Note") and deed of trust ("DOT") in favor of Bank  
7 of America, N.A., which encumbers the Property. After Debtor's  
8 grandmother passed away in 2002, Debtor's uncle inherited the  
9 Property; upon Debtor's uncle's death, the Property passed to  
10 Debtor by intestate succession. The parties do not dispute that  
11 Debtor is the owner of the Property.

12 The Note and Deed of Trust contain the following relevant  
13 contractual provisions:

14 Paragraph 11 of the Note provides that, in the event of a  
15 default, the bank has the right to declare the note due and payable  
16 at once; foreclose on the collateral; cancel any service contract;

17 (4) exercise all other rights, powers, and remedies given  
18 by law; and (5) recover from you all charges, costs, and  
19 expenses, including all collection costs and reasonable  
20 attorneys' fees incurred or paid by the Bank in  
21 exercising any right, power or remedy provided by this  
22 Loan Agreement or by law, together with interest on such  
23 collection costs, and fees at the interest rate in effect  
24 from time to time for the loan.

25 Paragraph 12 of the Note provides that if the borrower  
26 defaults, the borrower promises to pay the Bank

27 all reasonable costs and expenses it may incur, plus  
28 interest on those costs and expenses from the date  
incurred at the rate in effect for the loan. Those  
expenses may include, for example, to the extent allowed  
by law, reasonable attorney's fees for the Bank's own  
salaried attorneys or independent counsel that it hires.

29 The Short Form Deed of Trust executed by Maddalena E. Giusto  
and recorded on June 29, 2001, incorporates provisions (3) to (20)

1 of the fictitious deed of trust recorded in Santa Clara County on  
2 July 15, 1999. Paragraph 7 of the fictitious deed of trust  
3 provides:

4 If I fail to perform my obligations under this Deed of  
5 Trust, or if any action or proceeding adversely affects  
6 Bank's interest in the Property, Bank may, at Bank's  
7 option, take any action reasonably necessary (including,  
8 without limitation, paying expenses and attorneys' fees)  
9 to perform my obligations or to protect Bank's interest.  
10 Any sums that Bank pays in accordance with this Paragraph  
11 will be an additional indebtedness secured by this Deed  
12 of Trust. These payments will be subject to finance  
13 charge in accordance with the variable rate terms of the  
14 Loan Agreement and will be due and payable by me  
15 immediately upon Bank's demand.

16 Paragraph 11 of the fictitious deed of trust provides, in  
17 relevant part, "This Deed of Trust will bind and benefit the  
18 successors in interest of Bank and me, subject to Paragraph 14  
19 below."<sup>2</sup>

20 On December 30, 2013, Green Tree, acting under a Limited Power  
21 of Attorney by Bank of America, N.A., filed a motion for relief  
22 from the automatic stay under 11 U.S.C. § 362(d) (the "RFS  
23 Motion"). The RFS Motion and supporting declaration focused on the  
24 parties' contractual relationship, i.e., the Note and Deed of  
25 Trust. The RFS Motion and supporting declaration both state:

26 On or about June 20, 2001, Bank of America, N.A.,  
27 made a loan in the amount of 149000.00 [sic] ("Loan") to  
28 Debtors. In exchange for the Loan, Debtor[] executed and  
delivered a note in the original principal amount of  
\$149,000.00 ("Note") to Bank of America, N.A. As  
additional consideration, and as security for repayment  
of the Loan, Debtors made, executed, and delivered to  
Bank of America, N.A., as beneficiary, a Deed of Trust  
("Deed") dated June 20, 2001. True and correct copies of  
the Note and the Deed are attached as Exhibits "1" and  
"2" to the Declaration of Chassidy Kennedy filed

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<sup>2</sup>Paragraph 14 authorizes the Bank to accelerate the sums  
secured by the deed of trust if the property is transferred or sold  
without the Bank's written consent.

1 concurrently herewith and is [sic] incorporated herein by  
2 reference.

3 Under its Power of Attorney, Green Tree Servicing  
4 LLC has the authority to enforce the note and deed of  
5 trust. A true and correct copy of the Limited Power of  
6 Attorney is attached as Exhibit "3" to the Declaration of  
7 Chassidy Kennedy and is incorporated herein by reference.

8 The Deed encumbers the property commonly known as  
9 3971 Arbuckle Drive, San Jose CA 95214 ("Property").

10 Both the Note and the Deed require monthly payments  
11 of principal and interest to be made by Debtor[].

12 RFS Motion, page 2; Declaration of Chassidy Kenney, page 2 (Docket  
13 no. 28). The RFS Motion and declaration alleged that Debtor was  
14 delinquent in making payments required under the Note and Deed of  
15 Trust:

16 The [Debtor is] delinquent in making the payments  
17 required under the Note and the Deed. Post-petition  
18 payments are due from November 1, 2013 in the total  
19 post-petition amount of \$2,387.34. Further, Movant  
20 anticipates that the January 1, 2013 payment will be due  
21 by the hearing.

22 RFS Motion, page 2; Declaration, page 2. The RFS Motion  
23 requested relief to enforce Movant's rights under the Note and Deed  
24 of Trust as permitted by state law:

25 Movant desires to enforce its rights under the Note  
26 and the Deed by, among other things, pursuing foreclosure  
27 proceedings. Accordingly, Movant hereby requests that the  
28 automatic stay against enforcement by Movant of its  
rights under the Note and the Deed be terminated and that  
Movant be permitted to proceed in enforcing its rights,  
including but not limited to, foreclosing under the Note  
and the Deed as permitted by state law.

RFS Motion, page 3. In the alternative, the RFS Motion requested  
that the Court order adequate protection payments.<sup>3</sup>

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<sup>3</sup>It is clear that Green Tree would have had no right to  
adequate protection payments except for the parties' contractual  
relationship.

1 Debtor opposed the RFS Motion, arguing that Green Tree had  
2 failed to establish that it had standing to bring the RFS Motion or  
3 that it was in possession of the Note. This Court agreed and, on  
4 March 24, 2014, the Court entered an order requiring Green Tree to  
5 file an amended declaration by an officer or attorney for the  
6 lender or servicer that addressed Debtor's opposition no later than  
7 April 9, 2014. Green Tree did not file an amended declaration, and  
8 the RFS Motion was denied without prejudice on April 11, 2014. The  
9 Court's ruling was not based on a finding that Green Tree lacked  
10 standing, but that Green Tree had not demonstrated that it was the  
11 real party in interest entitled to enforce the Note and Deed of  
12 Trust.

13 Debtor now moves the Court for an order awarding attorney's  
14 fees and costs on the grounds that Debtor was the prevailing party  
15 in an action on a contract, and thus attorney's fees and costs  
16 should be awarded pursuant to CCC § 1717. Debtor seeks \$21,590.00  
17 in attorney's fees.<sup>4</sup>

18 Green Tree opposes the motion for fees, arguing that CCC  
19 § 1717 is not applicable in actions based upon § 362(d). In the  
20 alternative, Green Tree argues that even if CCC § 1717 could be  
21 applied to the stay litigation, Debtor is not entitled to  
22 attorney's fees because Debtor is not a party to the contract or an  
23 intended beneficiary of the contract, and Debtor does not stand in  
24 the shoes of the borrower. Green Tree has not made a substantive  
25 objection to the amount of fees, except for a footnote in Green  
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27 <sup>4</sup>Debtor originally sought \$12,000.00, but increased the  
28 request to reflect additional fees related to attending the initial  
hearing and preparing supplemental briefing on the issue of  
Debtor's standing.

1 Tree's supplemental brief opining that the fees "appear to be  
2 unreasonable." As discussed below, the Court finds that under  
3 California law, Green Tree's motion is an "action on a contract"  
4 because the RFS Motion was a necessary step for Green Tree to  
5 enforce the contract. Under the loan documents, Green Tree would  
6 have been entitled to its attorney's fees for litigating the RFS  
7 Motion. Therefore, the Debtor is entitled to reciprocal attorney's  
8 fees as the prevailing party, despite her nonsignatory status.

9  
10 **II. ISSUES**

11 1. Whether Debtor is entitled to reciprocal attorney's fees  
12 under CCC § 1717 in litigating a motion for relief from stay, in  
13 light of the Supreme Court's decision in Travelers Cas. & Sur. Co.  
14 v. Pac. Gas & Elec. Co., 549 U.S. 443, 448 (2007).

15 2. Whether Debtor is entitled to attorney's fees under the  
16 loan documents when Debtor is not a signatory to those documents.

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18 **III. ANALYSIS**

19 **A. Entitlement to Attorney's Fees in a Bankruptcy Proceeding**

20 In general, a prevailing litigant is not usually entitled to  
21 collect attorney's fees from the losing party. Alyeska Pipeline  
22 Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). This  
23 default rule, also known as the American Rule, may be overcome by  
24 statute or by an enforceable contract allocating attorney's fees.  
25 Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 549 U.S. 443,  
26 448 (2007) (citing Fleischmann Distilling Corp. v. Maier Brewing  
27 Co., 386 U.S. 714, 717 (1967)). In California, one such statute is  
28 CCC § 1717, which provides, in relevant part:

1 In any action on a contract, where the contract  
2 specifically provides that attorney's fees and costs,  
3 which are incurred to enforce that contract, shall be  
4 awarded either to one of the parties or to the prevailing  
5 party, then the party who is determined to be the party  
6 prevailing on the contract, whether he or she is the  
7 party specified in the contract or not, shall be entitled  
8 to reasonable attorney's fees in addition to other costs.

9 **1. The Johnson Case and Its Progeny**

10 Thirty years ago, the Ninth Circuit Court of Appeals held that  
11 attorney's fees under CCC § 1717 are not available in relief from  
12 stay litigation because such litigation is not an "action on a  
13 contract" and therefore CCC § 1717 is not applicable. In re  
14 Johnson, 756 F.2d 738, 740 (9<sup>th</sup> Cir. 1985). In Johnson, the debtor  
15 sought attorney's fees after the bankruptcy court denied a  
16 creditor's motion for relief from the stay. The Johnson court  
17 reasoned that state contract law is not ordinarily applied by the  
18 bankruptcy court in an action brought pursuant to § 362(d). Rather,

19 [s]tay litigation is limited to issues of the lack of  
20 adequate protection, the debtor's equity in the property,  
21 and the necessity of the property to an effective  
22 reorganization. Hearings on relief from the automatic  
23 stay are thus handled in a summary fashion. The validity  
24 of the claim or contract underlying the claim is not  
25 litigated during the hearing. The action seeking relief  
26 from the stay is not the assertion of a claim which would  
27 give rise to the right or obligation to assert a  
28 counterclaim. Thus, the state law governing contractual  
relationships is not considered in stay litigation.

(Citations and footnotes omitted).

Building on the Johnson decision, the Ninth Circuit Court of  
Appeals in 1991 held that attorney's fees could not be recovered in  
bankruptcy, absent bad faith or harassment, for litigating issues  
that do not involve basic contract enforcement questions, but  
issues peculiar to federal bankruptcy law. In re Fobian, 951 F.2d  
1149, 1153 (9<sup>th</sup> Cir. 1991), overruled by Travelers Casualty & Surety  
Co. of America v. Pacific Gas & Electric Co., 549 U.S. 443 (2007).

1           **2. Travelers overruled Fobian and Johnson.**

2           In Travelers, the Supreme Court overruled Fobian, holding that  
3 the Bankruptcy Code provides no basis for categorically disallowing  
4 contract-based claims for attorney's fees based solely on the fact  
5 that the fees at issue were incurred litigating issues of  
6 bankruptcy law. 549 U.S. at 449. The Supreme Court noted that none  
7 of the three Ninth Circuit cases provided as support for the  
8 decision in Fobian, i.e., Johnson; In re Coast Trading Co., 744  
9 F.2d 686 (1984); and In re Fulwiler, 624 F.2d 908 (9th Cir. 1980),  
10 identified any basis for disallowing a contractual claim for  
11 attorney's fees incurred litigating issues of federal bankruptcy  
12 law. Travelers, 549 U.S. at 452-53.

13           In Johnson, as in Fobian, the Ninth Circuit Court of Appeals  
14 had failed to acknowledge that parties to contracts have rights  
15 under state law that the Bankruptcy Code does not abrogate.  
16 Travelers explicitly held that an otherwise enforceable contract  
17 allocating attorney's fees is allowable in bankruptcy except where  
18 the Bankruptcy Code provides otherwise. Travelers, 549 U.S. at 448-  
19 49. The holding in Johnson was based not on an analysis of whether  
20 a relief from stay proceeding falls within the statutory term  
21 "action on a contract" but on the premise that the bankruptcy court  
22 should not have applied the state substantive law awarding  
23 attorney's fees in the first place. The Johnson court acknowledged  
24 that "the bankruptcy court has authority to apply either state  
25 substantive law or federal substantive law, but the choice depends  
26 on the nature of the action involved." Johnson, 756 B.R. at 740-41.  
27 The Johnson court concluded that because the matter did not involve  
28 the application of substantive state law, that the matter was not



1 an "action on a contract" to which CCC § 1717 would apply. Id. at  
2 741.

3 California courts have interpreted Travelers as overruling  
4 Johnson to the extent Johnson endorsed a categorical rule barring a  
5 contractual claim for attorney's fees incurred in litigating issues  
6 of federal bankruptcy law. See, e.g., Chinese Yellow Pages Company  
7 v. Chinese Overseas Marketing Service Corp., 170 Cal. App. 4<sup>th</sup> 868,  
8 887 (2009) (opining that Travelers had overruled Johnson because  
9 Travelers had resulted in the "disapproval of the body of law  
10 adverted to in Hassen Imports [In re Hassen Imports, 256 B.R. 916  
11 (9<sup>th</sup> Cir. BAP 2000)], which was discussed in the decisions of  
12 [Fobian and Johnson].")

13 Nevertheless, at least two bankruptcy courts have cited the  
14 Johnson decision post-Travelers for the premise that the validity  
15 of the claim or contract underlying the claim is not litigated  
16 during the relief from stay hearing. In re Aniel, 427 B.R. 811, 816  
17 (Bankr. N.D. Cal. 2010); In re Tadros, 2011 WL 590916, at \*1  
18 (Bankr. S.D. Cal. Feb. 10, 2011). This Court disagrees with those  
19 decisions. In any event, neither of these cases involved the  
20 application of CCC § 1717.

21 Importantly, for the reasons explained below, following  
22 Travelers, it is clear that the question of whether parties to a  
23 bankruptcy proceeding are entitled to attorney's fees under CCC  
24 § 1717 is purely a question of state law. See In re Penrod, 493  
25 B.R. 140, 145 (N.D. Cal. 2013); Chinese Yellow Pages, 170 Cal. App.  
26 4<sup>th</sup> at 884.

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1           **B. California Law Regarding CCC § 1717**

2           **1. California Courts Liberally Construe the Phrase "On A**  
3 **Contract."**

4           CCC § 1717(a) provides for reciprocal attorney's fees in any  
5 "action on a contract" containing an attorney's fee provision.  
6 Cases holding that attorney's fees are not available in bankruptcy  
7 to the prevailing party under CCC § 1717 are premised upon the  
8 notion that the matter is not an "action on a contract" under  
9 California law. E.g., Johnson, 756 F.2d at 741-42; Aniel, 427 B.R.  
10 at 816; Tadros, 2011 WL 590916, at \*1.

11           However, California courts liberally construe the phrase "on a  
12 contract" to extend to any action "[a]s long as an action  
13 'involves' a contract and one of the parties would be entitled to  
14 recover attorney fees under the contract if that party prevails in  
15 its lawsuit." In re Baroff, 105 F.3d 439 (9<sup>th</sup> Cir. 1997) (citing  
16 Milman v. Shukhat, 22 Cal. App. 4th 538, 27 Cal. Rptr. 2d 526,  
17 529-30 (1994)). Numerous California cases are in accord. See, e.g.,  
18 In re Tobacco Cases I, 193 Cal. App. 4<sup>th</sup> 1599 (2011). In Tobacco  
19 Cases I, the California Court of Appeals, in holding that a consent  
20 decree should be treated as a contract, noted that California  
21 courts construe the phrase "on a contract" liberally, and that, in  
22 order to hold otherwise, the Court of Appeals "would have to  
23 interpret the term 'on a contract' in section 1717 narrowly, which  
24 is impermissible under California law and antithetical to the  
25 Legislature's intent of ensuring reciprocity of remedy." Id. at  
26 1601. Other cases acknowledging that the phrase "on a contract"  
27 should be liberally construed include Eden Township Healthcare  
28 District v. Eden Medical Center, 220 Cal. App. 4<sup>th</sup> 418, 426 (2013);

1 Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.,  
2 158 Cal. App. 4<sup>th</sup> 479, 486 (2007); Douglas E. Barnart, Inc. v. CMC  
3 Fabricators, Inc., 211 Cal. App. 4<sup>th</sup> 230, 241 (2012); Dell Merk,  
4 Inc. v. Franzia, 132 Cal. App. 4<sup>th</sup> 443, 455 (2005); Brown Bark III,  
5 L.P. v. Haver, 219 Cal. App. 4<sup>th</sup> 809, 821 (2013); Turner v. Schultz,  
6 175 Cal. App. 4<sup>th</sup> 974, 979-80 (2013); and Blickman Turkus, L.P. v.  
7 Downtown Sunnyvale, LLC, 162 Cal. App. 4<sup>th</sup> 858, 894 (2008).

8 In Eden Township, the court observed that an action on a  
9 contract includes not only a traditional action for damages for  
10 breach of a contract containing an attorneys fee clause, but also  
11 any other action that "involves" a contract under which one of the  
12 parties would be entitled to recover attorney fees if it prevails  
13 in the action. 220 Cal. App. 4<sup>th</sup> at 426. The opinion includes  
14 examples of types of actions which have been deemed to be actions  
15 "on a contract": an action seeking declaratory and injunctive  
16 relief to enforce a consent decree or avoid enforcement of an  
17 arbitration clause; an action seeking declaratory and injunctive  
18 relief and quiet title based on violations of the terms of a  
19 promissory note and deed of trust; an unlawful detainer action  
20 based on a lessee's alleged breach of covenants in a lease; a  
21 conversion action based on breach of a safe deposit box contract;  
22 and an action for reformation of a contract. Eden Township, 220  
23 Cal. App. at 426-27.

24 The Eden Township court also gave examples of situations where  
25 actions were deemed to not be an "action on a contract" for  
26 purposes of CCC § 1717: an action asserting only tort claims; a  
27 tort action for fraud arising out of a contract; an action  
28 including a claim labeled breach of contract but not seeking to

1 enforce anyone's rights under the only contract containing an  
2 attorney fees clause; an unjust enrichment cause of action; an  
3 action on a contract that does not contain an attorney fees  
4 provision; an unlawful detainer action based on tortious holding  
5 over after expiration of a lease; an action against an attorney for  
6 professional negligence; or an action to enforce a judgment  
7 obtained for breach of a promissory note. Id. (citing Douglas E.  
8 Barnart, Inc. v. CMC Fabricators, Inc., 211 Cal. App. 4<sup>th</sup> 230, 241  
9 (2012)).

10 This Court has found only one case stating that CCC § 1717 is  
11 to be narrowly applied. In re Davison, 289 B.R. 716, 723-24 (9<sup>th</sup>  
12 Cir. BAP 2003). In Davison, the issue was whether a debtor who  
13 prevailed in a nondischargeability action under § 523(a)(2)(A) was  
14 entitled to attorney's fees under CCC § 1717. The BAP reversed the  
15 bankruptcy court's award of fees, holding that there was no  
16 contract claim involved, only a nondischargeability claim based on  
17 fraud. In its ruling, the BAP cited the California Supreme Court's  
18 decision in Santisas v. Goodin, 17 Cal. 4<sup>th</sup> 599, 615 (1998) as  
19 support for the notion that CCC § 1717 is to be narrowly applied  
20 and is available only if the dispute involves litigation of a  
21 contract claim. See also In re Hosseini, 504 B.R. 558, 567 n.13 (9<sup>th</sup>  
22 Cir. BAP 2014) (citing Davison in affirming the bankruptcy court's  
23 denial of attorney's fees for litigating the nondischargeability of  
24 a student loan).

25 The Ninth Circuit BAP's statement that CCC § 1717 should be  
26 narrowly applied is arguably dicta, as it was not necessary to the  
27 resolution of the appeal. In any event, this Court does not read  
28 Santisas as supporting a narrow interpretation of the phrase "on a

1 contract." Indeed, there is no such language in the Santisas  
2 decision. The Santisas court held that reciprocal attorney's fees  
3 were not available under CCC § 1717 when litigation had been  
4 voluntarily dismissed by the plaintiff before trial (but those fees  
5 were available under a different statute). The California Supreme  
6 Court noted that CCC § 1717 does not apply where the claims  
7 asserted are all tort claims, but did not appear to narrow the  
8 definition of the phrase "on a contract." See Santisas, 17 Cal. 4<sup>th</sup>  
9 at 614-17. As noted above, cases decided after Santisas uniformly  
10 continue to construe the phrase "on a contract" liberally, e.g.,  
11 Tobacco Cases I, 193 Cal. App. 4<sup>th</sup> 1599; Eden Township, 220 Cal.  
12 App. 4<sup>th</sup> 418; Mitchell Land & Improvement, 158 Cal. App. 4<sup>th</sup> 479;  
13 Douglas E. Barnart, 211 Cal. App. 4<sup>th</sup> 230; Dell Merk, 132 Cal. App.  
14 4<sup>th</sup> 443; Brown Bark III, 219 Cal. App. 4<sup>th</sup> 809; Turner, 175 Cal. App.  
15 4<sup>th</sup> 974; Blickman Turkus, 162 Cal. App. 4<sup>th</sup> 858, 894 (2008), and no  
16 party has cited any California case holding to the contrary.

17 2. An "Action on a Contract" Includes an Action To Enforce a  
18 Contract.

19 Under California law, an action is "on the contract" when it  
20 is brought to enforce the provisions of the contract. City of  
21 Emeryville v. Robinson, 621 F.3d 1251, 1267 (9<sup>th</sup> Cir. 2010) (citing  
22 MBNA America Bank, N.A. v. Gorman, 147 Cal. App. 4<sup>th</sup> Supp. 1, 7  
23 (2006)). In determining whether an action is on a contract for  
24 purposes of CCC § 1717, the proper focus is not on the nature of  
25 the remedy, e.g., equitable relief, but on the basis of the cause  
26 of action. Penrod, 493 B.R. at 146 (citing Tobacco Cases I, 193  
27 Cal. App. 4<sup>th</sup> at 1602).

28

1 After Travelers, California courts have upheld a creditor's  
2 right to seek attorney's fees incurred in bankruptcy court  
3 litigation to enforce a pre-petition judgment. See PSM Holding  
4 Corp. v. National Farm Financial Corp., 743 F. Supp. 2d 1136, 1163  
5 (C.D. Cal. 2010). In PSM, defendants sought fees under CCC § 1717  
6 for attorney's fees incurred in bankruptcy court proceedings that  
7 had been initiated by defendants themselves. The PSM court  
8 acknowledged that those fees may be available in some  
9 circumstances, but denied those on the ground that the fees  
10 incurred in the bankruptcy court were unnecessary. Id. at 1165. In  
11 reaching its decision, the court distinguished Circle Star Center  
12 Associates, L.P. v. Liberate Technologies, 147 Cal. App. 4<sup>th</sup> 1203  
13 (2007); Chinese Yellow Pages, supra; and Jaffe v. Pacelli, 165 Cal.  
14 App. 4<sup>th</sup> 927 (2008)). In all three of those cases, the California  
15 Court of Appeals held that creditors were entitled to seek, in  
16 post-bankruptcy proceedings in state court, attorney's fees  
17 incurred attempting to enforce pre-petition state court judgments  
18 in bankruptcy court, where the judgment and/or underlying contract  
19 provided for an award of attorney's fees.

20  
21 **C. Application of CCC § 1717 to Green Tree's Motion for Relief**  
22 **from Stay**

23 **1. Green Tree's Motion for Relief from Stay Was An Action to**  
24 **Enforce a Contract.**

25 The only relationship between Green Tree and the Debtor here  
26 is contractual. There is absolutely no tort or other non-  
27 contractual legal relationship between these two parties. And the  
28 only basis Green Tree had to bring a motion for relief from stay in

1 the bankruptcy court was to enforce Green Tree's rights under the  
2 contract. Indeed, Green Tree's RFS Motion sought to enforce the  
3 parties' contract and foreclose on the property and/or collect sums  
4 due under the contract. In order for Green Tree to exercise its  
5 rights under the loan documents, Green Tree was required to move  
6 for relief from the automatic stay. Such a motion is part and  
7 parcel of an action to enforce a contract, which is an action on a  
8 contract under California law. Green Tree's RFS Motion alleged that  
9 Debtor was delinquent in the contractual payments due under the  
10 Note and Deed of Trust and sought relief to exercise Green Tree's  
11 rights under state law or, in the alternative, requested that this  
12 Court order adequate protection payments. Green Tree could not  
13 enforce the contract in state court without taking the preliminary  
14 step of obtaining relief from stay in the bankruptcy court.  
15 Importantly, a creditor's standing to bring such a motion is  
16 determined by the creditor's state law rights under the note and  
17 deed of trust. Additionally, Green Tree's right to adequate  
18 protection payments derives solely out of the parties' contractual  
19 relationship.

20 **2. Whether or not Travelers overruled Johnson in toto, this**  
21 **case is distinguishable from Johnson.**

22 This case is distinguishable from Johnson and its progeny. An  
23 important aspect that distinguishes this case from Johnson and  
24 other cases holding to the contrary is that here, Debtor challenged  
25 Green Tree's standing. This was precisely a challenge to Green  
26 Tree's right to enforce the contract, and is thus an action on a  
27 contract under CCC § 1717. See Santisas, 17 Cal. 4<sup>th</sup> at 611  
28 (observing that CCC § 1717 applies "when a person sued on a

1 contract containing a provision for attorney fees to the prevailing  
2 party defends the litigation by successfully arguing the  
3 inapplicability, invalidity, unenforceability, or nonexistence of  
4 the same contract.") (citation and internal quotation omitted).  
5 Standing is not a unique issue in bankruptcy cases, particularly as  
6 a defense to a motion for relief from stay. Motions for relief from  
7 stay regularly involve issues other than equity and adequate  
8 protection, as was the case here and in numerous similar cases.  
9 E.g., In re Veal, 450 B.R. 897, 914-15 (9<sup>th</sup> Cir. BAP 2011); In re  
10 Hwang, 438 B.R. 661 (C.D. Cal. 2010); In re Aniel, 427 B.R. 811  
11 (Bankr. N.D. Cal. 2010); In re Jackson, 451 B.R. 24 (Bankr. E.D.  
12 Cal. 2011); In re Deamicis, 454 B.R. 756 (Bankr. E.D. Cal. 2011);  
13 In re Wilhelm, 407 B.R. 392 (Bankr. D. Idaho 2009); In re Jacobson,  
14 402 B.R. 359 (Bankr. W.D. Wash. 2009); In re Weisband, 427 B.R. 13  
15 (Bankr. D. Ariz. 2010).

16 Debtor prevailed on her challenge to the extent that this  
17 Court found that Green Tree had not demonstrated that it had the  
18 right to enforce the contract. This Court did not need to, nor did  
19 it, conclusively determine that Green Tree was not entitled to  
20 enforce the contract. See In re Veal, 450 B.R. 897, 914-15 (9<sup>th</sup> Cir.  
21 BAP 2011) (creditor need only establish that it has a colorable  
22 claim to enforce a right against property of the estate).  
23 Nevertheless, under a liberal construction of CCC § 1717, the fact  
24 that this matter turned on the issue of enforceability of the  
25 contract bolsters the conclusion that the RFS Motion was an action  
26 on a contract.

27  
28



1           **3. Relief from Stay Motions Generally are Actions on a**  
2 **Contract.**

3           Even when the issues in the motion and defense thereto are  
4 purportedly limited to equity and adequate protection, normally the  
5 only relationship of the parties is contractual, and the essential  
6 nature of the dispute is contractual, i.e., the motion seeks to  
7 enforce the contract between the parties and secure the creditor's  
8 remedies under the contract: payment and/or foreclosure.  
9 Accordingly, the Court concludes that most motions for relief from  
10 stay that seek relief to enforce a security interest should be  
11 construed as an "action on a contract" under California law. There  
12 may well be circumstances where motions for relief from stay are  
13 not based on contractual rights, e.g., where relief is sought to  
14 evict a debtor/squatter who has no contractual claim to occupy the  
15 premises.

16           **4. Green Tree Would Have Been Entitled to Its Attorney's Fees.**

17           Secured creditors nearly always seek and recover attorney's  
18 fees in connection with litigating motions for relief from stay.  
19 Secured creditors add the attorney's fees for litigating a motion  
20 for relief from stay to the total amounts due under the contracts  
21 by the debtors and recover those fees whether the creditor  
22 forecloses or is paid off through another means - typically a  
23 refinance or sale. In some cases, those fees may be awarded  
24 pursuant to § 506(b), which permits an oversecured creditor to  
25 recover attorney's fees. Penrod, 493 B.R. at 146. However, more  
26 often, those fees are sought under the attorney's fee provisions of  
27 the loan documents. Green Tree's RFS Motion did not include an  
28 explicit request for attorney's fees; however, the governing loan

1 documents contain very broad attorney's fee provisions, which  
2 entitle the creditor, in the event of default, to "recover all  
3 charges, costs, and expenses, including all collection costs and  
4 reasonable attorney's fees paid by the Bank in exercising any  
5 right, power or remedy provided by this Loan Agreement or by  
6 law . . . ." Promissory note, ¶ 11 (emphasis added). Therefore,  
7 under the language of the loan documents (despite counsel's  
8 argument to the contrary), Green Tree would be entitled to its  
9 reasonable attorney's fees incurred in bringing the RFS Motion. As  
10 such, Debtor is entitled to recover reciprocal fees under CCC  
11 § 1717 for successfully defending Green Tree's RFS Motion. Any  
12 other holding would render the attorney's fee provision in the loan  
13 documents "effectively unilateral" in violation of the policy  
14 expressed by CCC § 1717.

15 The purpose of CCC § 1717 is to ensure mutuality of remedy for  
16 attorney's fee claims under contractual attorney fee provisions.  
17 Santisas, 17 Cal. 4<sup>th</sup> at 610.

18 Courts have recognized that section 1717 has this effect  
19 in at least two distinct situations.

20 The first situation in which section 1717 makes an  
21 otherwise unilateral right reciprocal, thereby ensuring  
22 mutuality of remedy, is "when the contract provides the  
23 right to one party but not to the other." In this  
24 situation, the effect of section 1717 is to allow  
25 recovery of attorney fees by whichever contracting party  
26 prevails, "whether he or she is the party specified in  
27 the contract or not."

28 The second situation in which section 1717 makes an  
otherwise unilateral right reciprocal, thereby ensuring  
mutuality of remedy, is when a person sued on a contract  
containing a provision for attorney fees to the  
prevailing party defends the litigation by successfully  
arguing the inapplicability, invalidity,  
unenforceability, or nonexistence of the same contract.  
Because these arguments are inconsistent with a  
contractual claim for attorney fees under the same  
agreement, a party prevailing on any of these bases

1 usually cannot claim attorney fees as a contractual  
2 right. If section 1717 did not apply in this situation,  
3 the right to attorney fees would be effectively  
4 unilateral – regardless of the reciprocal wording of the  
5 attorney fee provision allowing attorney fees to the  
6 prevailing attorney – because only the party seeking to  
7 affirm and enforce the agreement could invoke its  
8 attorney fee provision. To ensure mutuality of remedy in  
9 this situation, it has been consistently held that when a  
10 party litigant prevails in an action on a contract by  
11 establishing that the contract is invalid, inapplicable,  
12 unenforceable, or nonexistent, section 1717 permits that  
13 party's recovery of attorney fees whenever the opposing  
14 parties would have been entitled to attorney fees under  
15 the contract had they prevailed.

9 Santisas, 17 Cal. 4<sup>th</sup> at 610-11 (citations and internal quotations  
10 omitted).

11 The fact that the debtor is in a bankruptcy should not  
12 abrogate that policy.

13 As discussed above, Johnson was overruled by Travelers.  
14 However, even if Johnson maintains viability, for the reasons  
15 discussed above, this case is distinguishable from Johnson because  
16 it involves a challenge to the creditor's standing, i.e., a direct  
17 challenge to creditor's right to enforce the contract. Moreover, as  
18 cited above, there is a legion of California cases holding that the  
19 term "on a contract" as used in § CCC § 1717 should be liberally  
20 construed. Accordingly, even where there is no direct challenge to  
21 standing, the parties' relationship is defined and exists only by  
22 virtue of the loan documents, i.e., the contract. No party has  
23 cited any California cases indicating that this Court's  
24 interpretation of CCC § 1717 is incorrect.<sup>5</sup>

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25  
26 <sup>5</sup>This Court's ruling is not at odds with Penrod, supra. In  
27 Penrod, the bankruptcy court overruled a creditor's objection to  
28 confirmation of the debtor's chapter 13 plan. The question before  
the bankruptcy court was whether a portion of the creditor's claim  
was a purchase money security interest that had to be treated as a  
secured claim. The district court affirmed the bankruptcy court's  
denial of attorney's fees under CCC § 1717 based on its finding

1           **5. Debtor Was the Prevailing Party.**

2           It is important to note that Green Tree does not dispute  
3 Debtor's assertion that she is the prevailing party on the RFS  
4 Motion, and the Court so finds. A prevailing party is the party who  
5 has recovered a greater relief in the action on the contract. CCC  
6 § 1717(b). When a defendant defeats recovery by the plaintiff on  
7 the only contract claim in the action, the defendant is the party  
8 prevailing on the contract under section 1717 as a matter of law.  
9 Hsu v. Abbara, 9 Cal. 4<sup>th</sup> 863, 877 (1995). Here, Debtor achieved her  
10 objective of defeating Green Tree's RFS Motion and is thus the  
11 prevailing party.<sup>6</sup>

12  
13           **D. Debtor's Entitlement to Attorney's Fees as a Nonsignatory**  
14 **to the Loan Documents**

15           Green Tree contends that Debtor is not entitled to attorney's  
16 fees because she was not a signatory to the loan documents and  
17 therefore is not personally liable. Green Tree asserts that a  
18 nonsignatory party is entitled to attorney's fees in only two

19 \_\_\_\_\_  
20 that the litigation did not involve an action on the contract: The  
21 debtor did not contest the amount due under the contract, the  
22 meaning of the contract, or the enforceability of the contract, but  
23 rather sought to modify the terms of the contract under federal  
24 bankruptcy law. The district court observed: "The litigation had  
little to do with the parties' actual contract and concerned only  
abstract issues of how to treat the negative equity associated with  
a debtor's trade-in vehicle under bankruptcy law." Penrod, 493 B.R.  
at 147.

25           <sup>6</sup>This bankruptcy case does not need to be concluded for the  
26 Court to make a prevailing party determination. Regardless of  
27 whether this bankruptcy case was confirmed, dismissed, or  
28 converted, under the loan documents, Green Tree would have been  
entitled to its fees for prosecuting the relief from stay motion  
had it prevailed. Therefore, under the reciprocal provisions of CCC  
§ 1717, Debtor is entitled to her fees in prevailing on this  
motion.

1 instances: where the nonsignatory party stands in the shoes of a  
2 party to the contract, e.g., as an alter ego, and where the  
3 nonsignatory party is a third party beneficiary of the contract. In  
4 support, Green Tree cites Reynolds Metals Co. v. Alperson, 25 Cal.  
5 3d 124 (1979) and Blickman Turkus, LP v. MF Downtown Sunnyvale,  
6 LLC, 162 Cal. App. 4<sup>th</sup> 858, 897 (2008). However, for the reasons  
7 explained below, if Green Tree had prevailed on its RFS Motion,  
8 Green Tree could have added its attorney's fees to the sums due on  
9 the Note and Deed of Trust and would have recovered those fees if  
10 Debtor sold or refinanced the Property. Accordingly, Debtor is  
11 entitled to recover reciprocal fees despite her nonsignatory  
12 status.

13 In Reynolds Metals, the California Supreme Court held that  
14 § 1717 should "be interpreted to provide a reciprocal remedy to a  
15 nonsignatory defendant, sued on a contract as if he were a party to  
16 it, when the plaintiff would clearly be entitled to attorney's fees  
17 should he prevail in enforcing the contractual obligation against  
18 the defendant." 25 Cal. 3d at 129. The plaintiff in that case had  
19 alleged that defendants were the alter egos of the signatory to the  
20 relevant contract. Had plaintiffs prevailed, the defendants would  
21 have been liable on the notes and for the attorney's fees.  
22 Therefore, the court held that defendants, who had prevailed in the  
23 litigation, were entitled to attorney's fees under § 1717.

24 In Blickman Turkus, a brokerage firm, as an alleged third-  
25 party beneficiary to a commission agreement, sued a lessor for  
26 breach of that agreement. Lessor prevailed, and sought attorney's  
27 fees under the commission agreement, which the trial court denied.  
28 The Court of Appeals affirmed the trial court. With respect to

1 attorney's fees, the court applied the test set forth in Reynolds  
2 Metals. Because the plain language of the fee provision in the  
3 contract limited the allowance of fees to "any litigation between  
4 the parties hereto," the court held that the brokerage firm, which  
5 was not a party to the contract, would not have been entitled to  
6 attorney's fees had it prevailed. Therefore, the lessor was not  
7 entitled to fees under § 1717 either. Blickman Turkus, 162 Cal.  
8 App. 4<sup>th</sup> at 896.

9 In Saucedo v. Mercury Savings & Loan Ass'n, 111 Cal. App. 3d  
10 309 (1980), cited by Debtor, plaintiffs had purchased real property  
11 "subject to" an existing note and deed of trust. After plaintiffs  
12 refused to assume the loan because they objected to changes in the  
13 loan terms, the lender commenced foreclosure proceedings.  
14 Plaintiffs sued the lender for declaratory relief, an injunction,  
15 and exemplary damages. Plaintiffs also sought attorney's fees.  
16 Plaintiffs prevailed on their claim for declaratory relief.  
17 Defendants objected to any award of attorney's fees, arguing that  
18 because plaintiffs were not parties to the note or deed of trust  
19 that the lender could not have been held liable for attorney's fees  
20 had it prevailed.

21 The Court of Appeals reversed, overruling its previous  
22 decision in Pas v. Hill, 87 Cal. App. 3d 521 (1978). In Pas, the  
23 court had held that "subject to" purchasers were not entitled to  
24 recover attorney's fees because, not being parties to the note and  
25 deed of trust, they were not personally liable to perform the  
26 obligations created by those instruments and could not have been  
27 held liable for attorney's fees had the beneficiary and trustee of  
28 the deed of trust prevailed. In Saucedo, the court reconsidered the  
Pas opinion, holding:

1           On rethinking the matter we agree with plaintiffs  
2 and the authorities noted. While we adhere to our  
3 conclusion that Civil Code section 1717 was not intended  
4 to extend the right to recover attorney fees to persons  
5 who themselves could not have been required to pay  
6 attorney fees in the event their adversary prevailed in  
7 the action, we are persuaded that in every case in which  
8 the nonassuming grantee has a sufficient interest in the  
9 property to warrant his resisting foreclosure, he would  
10 as a real and practical matter be required to pay  
11 reasonable attorney fees incurred by trustee and/or  
12 beneficiary should they prevail in the action to prevent  
13 foreclosure.

8           While the nonassuming grantee would not have been  
9 personally liable for payment of attorney fees under the  
10 note and deed of trust, the trustee and/or beneficiary  
11 would have been entitled to attorney fees under the  
12 provisions of the deed of trust had they prevailed, and  
13 these fees would have become part of the debt secured by  
14 the deed of trust. To prevent foreclosure of his  
15 interest, the nonassuming grantee would have had to pay  
16 off the secured debt, including the attorney fees, by  
17 refinancing or otherwise. This practical "liability" of  
18 the nonassuming grantee is sufficient to call into play  
19 the remedial reciprocity established by Civil Code  
20 section 1717.

15 Saucedo, 111 Cal. App. 3d at 315 (citations and footnote omitted).  
16 Green Tree argues that Saucedo is distinguishable because here, the  
17 Debtor is not a nonassuming grantee.

18           The Court does not read Reynolds Metals or Blickman Turkus as  
19 limiting the reciprocal remedy under CCC § 1717 to the specific  
20 facts of those cases. The decision in Blickman Turkus turned on the  
21 fact that the attorney's fees clause at issue in that case limited  
22 recovery to the parties to the contract. Under Reynolds Metals and  
23 Saucedo, the test is whether Green Tree would have been entitled to  
24 attorney's fees had it prevailed on the RFS Motion. Under the loan  
25 documents, if Green Tree had established its standing and prevailed  
26 on the RFS Motion, Green Tree could have added its attorney's fees  
27 incurred in prosecuting the RFS Motion to the amounts due on the  
28 Note and Deed of Trust, and Debtor would have had to pay those fees  
to pay off the Note and/or avoid foreclosure. Because the Court

1 concludes that Green Tree would have been entitled to its fees had  
2 it prevailed on its RFS Motion, Debtor is entitled to reciprocal  
3 fees.

4

5 **E. Reasonableness of Attorney's Fees**

6 A prevailing party is not necessarily entitled to recover all  
7 of its requested attorney's fees. Douglas E. Barnhard, Inc. v. CMC  
8 Fabricators, Inc., 211 Cal. App. 4<sup>th</sup> 230, 249 (2012). Rather, this  
9 Court has discretion to fix a reasonable amount of attorney's fees  
10 by determining the number of hours reasonably expended on the case  
11 and a reasonable hourly rate for the work. Id. The time spent  
12 litigating the fee claim is compensable. See Bruckman v. Parliament  
13 Escrow Corp., 190 Cal. App. 3d 1051, 1062 (1987) (citing Brown v.  
14 Fairleigh Dickinson University, 560 F. Supp. 391, 414 (D.N.J.  
15 1983)).

16 As noted, the Debtor seeks \$21,590.00 in attorney's fees. The  
17 request is supported by detailed time records and explanations of  
18 the work done. In a footnote, Green Tree states that "the  
19 attorneys' fees sought appear to be unreasonable as to the amount  
20 and nature of the alleged work performed." However, Green Tree has  
21 not objected to any specific time entries or the hourly rates  
22 charged by Debtor's attorneys. According to the time records, the  
23 bulk of the fees were incurred by Mr. Erickson, who billed a total  
24 of 58.6 hours at a rate of \$350 per hour (\$20,510.00). Mr.  
25 Erickson's hourly rate is commensurate with hourly rates charged by  
26 attorneys in this District. Regarding the number of hours spent,  
27 although 58.6 hours is significant, the Court has carefully  
28 reviewed the request and supporting documentation and finds that  
the time spent was reasonable given the difficulty, complexity, and



1 skill required to analyze the issues in this matter. Accordingly,  
2 the Court finds that Debtor is entitled to recover the full amount  
3 of fees requested, \$21,590.00.

4

5

**IV. CONCLUSION**

6 Green Tree's RFS Motion was an action to enforce a contract.  
7 Pursuant to the loan documents governing the subject loan, Green  
8 Tree would have been entitled to its fees incurred in prosecuting  
9 the RFS Motion. Accordingly, Debtor, despite her status as a  
10 nonsignatory to the loan documents, is entitled to recovery of her  
11 reasonable attorney's fees pursuant to CCC § 1717, and the Court  
12 finds that \$21,590 is reasonable.

13 Counsel for the Debtor may submit a proposed form of order,  
14 after review as to form by counsel for Green Tree.

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**\*\*\* END OF MEMORANDUM DECISION \*\*\***

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