

**MAR 29 2007**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP No.	ID-06-1189-NBS
	)		
MICHAEL HARRISON and	)	BK. No.	04-02709
JULIE HARRISON,	)		
	)	Adv. No.	04-06234
Debtors.	)		
_____	)		
MICHAEL HARRISON,	)		
	)		
Appellant.	)		
v.	)		
	)		
BARRY BALLEW,	)		
	)		
Appellee.	)		
_____	)		

**M E M O R A N D U M<sup>1</sup>**

Argued and Submitted on January 17, 2007  
at Pasadena, California

Filed - March 29, 2007

Appeal from the United States Bankruptcy Court  
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: NAUGLE,<sup>2</sup> BRANDT and SMITH, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> Hon. David N. Naugle, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Michael Harrison ("Harrison") appeals from the judgment in  
2 favor of Barry Ballew ("Ballew") following trial in the  
3 bankruptcy court. Judgment in the amount of \$59,930.35 was  
4 entered in favor of Ballew and against Harrison pursuant to  
5 § 523(a)(2)(A)<sup>3</sup> and excepted from the discharge of Harrison  
6 only.<sup>4</sup> Judgment was also entered in favor of Ballew and against  
7 Harrison pursuant to § 523(a)(6), from which Harrison does not  
8 appeal. Harrison argues that the bankruptcy court erred in  
9 finding that: (1) Ballew justifiably relied upon Harrison's  
10 representations under § 523(a)(2)(A); (2) Harrison's  
11 representations were the proximate cause of a state court  
12 judgment against Ballew in the amount of \$33,738.79; and (3)  
13 Harrison was not entitled to an offset of damages. We AFFIRM.

#### 14 **FACTS**

15 Harrison was in the business of real estate development,  
16 including buying land, building homes, moving homes and reselling  
17 properties. In 1994, he purchased several lots, including Lots 28  
18 and 29 located off Petrie Street in Boise, Idaho. The lots were  
19 purchased in the name of Harrison's mother, Betty Harrison, due  
20 to Harrison's poor credit history.

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21  
22 <sup>3</sup> Unless otherwise indicated, all "Code," chapter, and  
23 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
24 1330 prior to its amendment by the Bankruptcy Abuse Prevention  
25 and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23,  
26 as the case from which the adversary proceeding and this appeal  
arises was filed before its effective date (generally 17 October  
2005). All Rule references are to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9036.

27 <sup>4</sup> Julie Harrison was a defendant in the adversary  
28 proceeding; however, the bankruptcy court determined that the  
claims asserted against her were without merit, and judgment of  
dismissal was entered in favor of Julie Harrison and against  
Ballew.

1 Harrison split Lot 28, which created two lots instead of  
2 one. The second lot was known as a flag lot, which was  
3 described in the bankruptcy court's memorandum of decision as  
4 "consisting of a large rectangular parcel to the north connected  
5 by the 'pole' portion of the property to Petrie Street, thereby  
6 providing street access to the lot." He also owned 6819 Poplar  
7 and 6821 Poplar, which were located to the north of Lot 28.  
8 Harrison built improvements on Lot 28; however, the house  
9 encroached onto 6912 Petrie. He also built a guest house on Lot  
10 28, known as 6904 Petrie. A home was moved onto 6912 Petrie, and  
11 Harrison obtained a permit to pour the foundation for 6912 Petrie  
12 and building permits to construct the house at 6900 Petrie and  
13 the guest house at 6904 Petrie. However, the plans failed to  
14 show that, because of a ditch on 6900 Petrie, the house on 6900  
15 Petrie would encroach onto 6912 Petrie. The City of Boise  
16 inspected the construction and approved the same. Harrison  
17 failed to obtain approval for completion of the shared driveway  
18 and constructed the driveway without permit.

19 During this time, Harrison hired a land surveyor, Colleen  
20 Marks ("Marks"), who performed a survey. Harrison's goal in  
21 engaging Marks was to: (1) adjust the north/south lot line  
22 between Lots 28 and 29 to the center of the driveway; (2) combine  
23 6819 Poplar, where the shop was located, with 6912 Petrie; and  
24 (3) adjust the lot line of 6821 Poplar.

25 Ultimately, the lot line between Lots 28 and 29 was never  
26 adjusted because Marks was told by Harrison to leave the lot line  
27 as is. The survey was limited to eliminating the property line  
28 between 6819 Poplar and 6912 Petrie and adjusting the property

1 line for 6821 Poplar. Harrison neither signed nor recorded the  
2 survey report. Marks made several failed attempts to contact  
3 Harrison about the status of the project and to record the  
4 survey. In October of 2001, Marks noticed a "sold" sign at 6821  
5 Poplar and determined that the legal description in the  
6 conveyance was the same legal description which she had provided.  
7 Marks then recorded her survey report to protect herself under  
8 Idaho law.

9 Harrison and Ballew had been friends and business associates  
10 since approximately 1986. Ballew returned from Japan and sought  
11 Harrison's assistance in finding a residence. Ballew was  
12 interested in buying a home owned by Julie Harrison, which he had  
13 been renting (the "Frye Property"). Because Ballew was unable to  
14 obtain financing for the Frye Property, Harrison recommended that  
15 he purchase 6912 Petrie Street. Harrison represented that the  
16 flag lot, on which 6912 Petrie was located, included one-half of  
17 a common driveway and a garage, also known as a shop. Ballew  
18 raised questions regarding the lot lines and expressed concerns  
19 about the driveway access, location of trees and placement of  
20 irrigation ditches that were located on the property.

21 The property was appraised by Roger Jennings ("Jennings"),  
22 a real estate appraiser, who valued 6912 Petrie for Hopkins  
23 Financial ("Hopkins"), the lender. In reliance upon Harrison's  
24 representations, including the fact that the land, house and shop  
25 were located on one lot, Jennings valued 6912 Petrie at \$129,000.  
26 At trial, he testified that 6912 Petrie would be worth

1 significantly less due to the property line and encroachment  
2 problems.<sup>5</sup>

3 Ballew bought 6912 Petrie for the purchase price of  
4 \$130,000, which he believed included the house and the shop.  
5 He received credit for \$8,000, which was the amount of his down  
6 payment on the Frye Property, borrowed \$105,000 from Hopkins in  
7 exchange for a mortgage on 6912 Petrie, and signed a promissory  
8 note in favor of Julie Harrison for the approximate balance of  
9 \$16,700, secured by a second deed of trust on 6912 Petrie.

10 A Residential Purchase Agreement ("Agreement") was presented  
11 to Ballew for the first time upon closing in September of 1999.  
12 With Ballew's permission, Harrison signed Ballew's name on the  
13 Agreement in the place of Buyer. Harrison added the language  
14 "as is where is without any warranties expressed or implied."  
15 Ballew was concerned at closing when he discovered the "as is"  
16 language as well as the fact that title to 6912 Petrie was held  
17 by Betty Harrison. Betty Harrison had granted Special Power of  
18 Attorney to Harrison to act on her behalf in selling 6912 Petrie,  
19 and she received no funds from the sale of 6912 Petrie. Although  
20 Ballew had concerns at closing, he completed the transaction and  
21 remained silent because Harrison had assisted him in obtaining  
22 the financing for 6912 Petrie. Further, Harrison provided Ballew  
23 with a warranty deed.

24 Immediately after closing, Harrison told Ballew that he  
25 noticed the legal description in the deed failed to include the

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26  
27 <sup>5</sup> Jennings could not recall who met him at the property  
28 and showed him the boundary lines; however, the bankruptcy court  
concluded that there was no reason to believe that Jennings met  
with anyone other than Harrison, a reasonable inference.

1 shop property and assured Ballew that he would remedy this  
2 problem by deeding the property to him, but failed to do so.  
3 Ballew took possession of the home and the shop located on 6912  
4 Petrie and began making improvements.

5 Lot 29 was lost in foreclosure in early 2000. Prior to  
6 the foreclosure, Julie Harrison, record title holder of Lot  
7 29, executed an easement for use of the shared driveway in favor  
8 of Ballew because Harrison believed the easement was necessary.  
9 There is no indication that Ballew was aware of the easement  
10 giving him right of use to the shared driveway, nor any  
11 determination of the effect of the foreclosure on the newly  
12 granted easement.

13 In May of 2000, Julie Harrison transferred the note to  
14 Kim Kildew ("Kildew"). That summer Ballew observed survey stakes  
15 in the neighboring lot that appeared to designate a property line  
16 that did not meet with his understanding of the boundaries. He  
17 measured the boundary lines, drew a plat map and determined  
18 that title to 6912 Petrie was adversely affected by flaws and  
19 setback problems. Ballew remained silent about these concerns.

20 In January of 2001, Ballew stopped paying on the note to  
21 Kildew, and in November of 2001 he also stopped paying on the  
22 mortgage held by Hopkins. Kildew sent Ballew a Notice of Default  
23 in November of 2001, but failed to initiate foreclosure  
24 proceedings. Kildew sued Ballew in state court and obtained a  
25 judgment pursuant to stipulation ("State Court Judgment") against  
26 Ballew in the amount of \$33,738.79. Ballew lived at 6912 Petrie  
27 from November 2001 through December 2003 without making any  
28 payments on the note or the mortgage.

1 Trial was held in the bankruptcy court. Ballew dismissed  
2 two of his claims at trial; the bankruptcy court entered judgment  
3 in favor of Ballew and against Harrison on the two remaining  
4 claims pursuant to § 523(a)(2)(A) and § 523(a)(6). The  
5 bankruptcy court also determined that Harrison was not entitled  
6 to an offset of damages. Judgment was entered in the amount of  
7 \$59,930.35, and the amount was excepted from the discharge of  
8 Harrison. The bankruptcy court entered judgment of dismissal in  
9 favor of Julie Harrison and against Ballew.

10 On appeal, Harrison contends that the bankruptcy court  
11 erred in finding that: (1) Ballew justifiably relied upon  
12 Harrison's representations under § 523(a)(2)(A); (2) Harrison's  
13 representations were the proximate cause of the State Court  
14 Judgment under § 523(a)(2)(A); and (3) Harrison was not entitled  
15 to an offset of damages.

#### 16 JURISDICTION

17 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
18 and § 157(b)(1) and (b)(2). This panel has jurisdiction under 28  
19 U.S.C. § 158 (a)(1) and (b).

#### 20 ISSUES

- 21 1. Whether the bankruptcy court erred in determining that  
22 Ballew justifiably relied upon Harrison's representations.
- 23 2. Whether the bankruptcy court erred in determining that  
24 Harrison's representations were the proximate cause of the  
25 State Court Judgment against Ballew in the amount of  
26 \$33,738.79.
- 27 3. Whether the bankruptcy court erred in determining that  
28 Harrison was not entitled to an offset of damages

1 because Ballew failed to recover at trial for loss of  
2 equity.

### 3 STANDARD OF REVIEW

4 We review the bankruptcy court's finding of facts under  
5 the clearly erroneous standard and its conclusions of law de  
6 novo. In re Kirsch, 973 F.2d 1454, 1455 (9th Cir. 1992). Findings  
7 of fact shall not be set aside unless clearly erroneous. Fed.  
8 R. Bank. P. 8013. The clearly erroneous standard is applied to a  
9 determination of justifiable reliance, which is a question of  
10 fact. Id. A finding of proximate cause may be reversed only if  
11 clearly erroneous. Britton v. Price (In re Britton), 950 F.2d  
12 602, 604 (9th Cir. 1991).

### 13 DISCUSSION

#### 14 1. The Bankruptcy Court Did Not Err In Finding 15 That Ballew Justifiably Relied Upon Harrison's Representations

16 Section 523(a)(2)(A) provides, in relevant part, that a  
17 debt for money, property, services, or an extension, renewal,  
18 or refinancing of credit is not discharged to the extent it was  
19 obtained by false pretenses, a false representation, or actual  
20 fraud, other than a statement respecting the debtor's or an  
21 insider's financial condition. To except a debt from discharge,  
22 a creditor must prove: (1) the debtor made the representations;  
23 (2) the debtor knew the representations were false at the time  
24 they were made; (3) the debtor made the representations with the  
25 intention and purpose of deceiving the creditor; (4) the creditor  
26 relied upon such representations; and (5) the creditor sustained  
27 the alleged loss and damage as the proximate result of the  
28 representations having been made. Britton, 950 F.2d at 604.



1 In this Circuit, a creditor must prove "justifiable reliance  
2 upon the representations of the debtor." Kirsch, 973 F.2d at  
3 1460. This requires an examination of all circumstances as well  
4 as the subjective effect of the circumstances upon the creditor.  
5 Id. See also Restatement (Second) of Torts § 537(b) (1977) ("The  
6 recipient of a fraudulent misrepresentation can recover against  
7 its maker for pecuniary loss if, but only if, (a) he relies on  
8 the misrepresentation in acting or refraining from action, and  
9 (b) his reliance is justifiable.").

10 Harrison argues that the standard applicable to Ballew's  
11 conduct is such that "... under the circumstances, the facts  
12 should be apparent to one of his knowledge and intelligence  
13 from a cursory glance, or he has discovered something which  
14 should serve as a warning that he is being deceived, that he is  
15 required to make an investigation of his own." Field v. Mans, 516  
16 U.S. 59, 71, 116 S.Ct. 437, 444-45, 133 L.Ed. 2d 351 (1995)  
17 (citations omitted). He further argues that "a person is  
18 required to use his senses, and cannot recover if he blindly  
19 relies upon a misrepresentation the falsity of which would be  
20 patent to him if he had utilized his opportunity to make a  
21 cursory examination or investigation." Id. (citations omitted).

22 Harrison is correct that Field sets forth a subjective  
23 standard as to the characteristics of a particular plaintiff, as  
24 opposed to the "reasonable man" standard. Id. at 71. The record  
25 reflects that the bankruptcy court applied the correct standard.

26 Harrison argues that in Smith v. Young, (In re Young), 208  
27 B.R. 189, 197 (Bankr. S.D. Cal. 1997), as here, the plaintiffs  
28 acted upon justifiable reliance "but only until they had

1 suspicion that else was in reality the case." Id. at 202. He  
2 contends that Harrison and Ballew were friends and business  
3 associates, had nicknames for each other, took extended trips  
4 abroad together and shared interest and knowledge about the  
5 other's personal life.

6 He further argues that the friendship does not justify  
7 reliance based upon Ballew's concerns that: (1) Harrison was able  
8 to move and build all of the structures on the properties, (2)  
9 access to the driveway, (3) location of the irrigation ditches  
10 and trees, (4) the original asking price of \$139,000, (5) review  
11 of the Agreement for the first time at closing, (6) the "as is"  
12 language, and (7) access to the title report for the first time  
13 at closing, but failure to review the same. Harrison contends  
14 that this conduct is the kind of blind reliance noted in Field to  
15 be unjustifiable.

16 Smith was disapproved by Cohen v. De La Cruz, 523 U.S. 213,  
17 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). Harrison appears to cite  
18 the case for the proposition that plaintiffs therein and Ballew  
19 shared factual similarities, and like those plaintiffs, Ballew  
20 did not justifiably rely upon the representations of Harrison  
21 once certain suspicions were raised. We have also noted that  
22 the case is not good law in light of Cohen. Cobe v. Smith (In re  
23 Cobe), 229 B.R. 15, 18 (9th Cir. BAP 1998).

24 Ballew testified at trial:

25 There was an urgency on all sides to get  
26 this deal closed. I was happy and grateful  
27 that he had assisted me in finding the  
28 financing, like I had previously testified  
that just getting a phone in my name  
seemed to be difficult-so I- there was a  
lot of paperwork, I didn't like a lot of  
what I was seeing, I was a little nervous,

1 but I didn't feel like I needed to go hey,  
2 guys, you know what, I'm having second  
3 thoughts, maybe we ought to stop and let's  
4 look at all these papers, because, gosh, this,  
5 you know, doesn't feel really comfortable  
6 right now, because we're all the way down this  
7 road, the down payment money's been spent.

8 Trial Tr. at 170:3-12, Dec. 9, 2005.

9 The bankruptcy court made the following findings:

10 Plaintiff was justified in his reliance on  
11 Mr. Harrison's representations as to the  
12 location of the property lines. Plaintiff and  
13 Mr. Harrison were good friends. There was  
14 nothing about the physical appearance of the  
15 property or location of the improvements  
16 that would have caused Plaintiff to doubt  
17 the truth of what Mr. Harrison had told him  
18 about the property boundaries. And nothing  
19 occurred prior to the closing that would have  
20 led Plaintiff to believe the property lines  
21 were other than as represented.

22 The property was appraised for Plaintiff's  
23 lender based upon the erroneous boundaries  
24 Mr. Harrison had given to the appraiser, and  
25 a title insurance policy was issued. The only  
26 practical manner in which Plaintiff could  
27 have discovered Mr. Harrison's deceit was by  
28 his personal review of the recorded plats,  
something no one, including Mr. Harrison, would  
expect Plaintiff to do. The legal descriptions  
and the property's physical appearance  
comported with Mr. Harrison's representations.  
Plaintiff had no reason to question the  
boundaries, Mr. Harrison, the property's developer  
showed him.

29 Mem. Decision at 29-30, Feb. 10, 2006.

30 In 2000, prior to losing Lot 29 in foreclosure, Julie  
31 Harrison, at the request of Harrison, granted an easement to  
32 Ballew for use of the driveway. Although Harrison testified that  
33 he was not aware of the problem with the lot lines until 2001,  
34 the bankruptcy court concluded that Harrison's testimony was not  
35 credible, and he had contradicted his own prior testimony that he  
36 knew as early as 1996 that the house at 6900 Petrie encroached

1 onto 6912 Petrie. The bankruptcy court also concluded that, in  
2 all respects, the legal description and physical inspection of  
3 the property comported with Harrison's representations to Ballew.

4 That Ballew's reliance on the representation of Harrison was  
5 both subjectively and objectively reasonable is bolstered by  
6 several factors: Harrison was a sophisticate in the business of  
7 Idaho real estate development, i.e., buying, selling, building,  
8 splitting parcels, securing surveys, facilitating financing with  
9 outside lenders, like Hopkins, and making unconventional  
10 transactions with land titles and lending via his mother and his  
11 wife.

12 Ballew was a recent arrival from overseas, who even had  
13 difficulty securing new telephone service. When confronted with  
14 changes and deficiencies (like the "as is" clause and the  
15 shop/garage location), Harrison gave assurances to his friend  
16 that the problems would be corrected. In addition, as conceded by  
17 his counsel in argument, he gave a warranty deed. Ballew paid the  
18 \$130,000, a good indication of subjective reliance.

19 The level of "justifiable reliance" has a fine point of  
20 distinction between the situation presented here under  
21 § 523(a)(2)(A) and an action under § 523(a)(2)(B), as explained  
22 in footnote 6 of the recent case of In re McGee, No. OR-06-  
23 1065, 2006 Bankr. LEXIS 3554, at \*6 n.6 (9th Cir. BAP Dec.6,  
24 2006). The reliance in the case before this panel is both  
25 justifiable and reasonable. The slightly more lenient standard  
26 under § 523(a)(2)(A) applies in this case.

27 The record does not reflect that any documents were produced  
28 at closing to remedy the misrepresentations made by Harrison

1 regarding the faulty setback, encroachments and defects in title  
2 upon which Ballew justifiably relied. The bankruptcy court  
3 determined that the only way Ballew could have discovered the  
4 falsity of Harrison's misrepresentations was to personally review  
5 the recorded plats, something that he was not required to do.

6 Under Idaho law, a transferor of residential real property  
7 is required to provide written disclosures. Idaho Code § 55-2504  
8 ("Property Condition Disclosure Required") provides that any  
9 person who intends to transfer any residential real property  
10 complete the form as provided in Idaho Code § 55-2508, a Sellers'  
11 Disclosure Form, which sets forth, in relevant part:

- 12 (6) Describe any condition that may affect  
13 your ability to clear title (such as  
14 encroachments, easements, zoning,  
violation, lot line disputes, etc.)

15 Idaho Code § 55-2508.

16 Harrison did not provide evidence at trial to prove that  
17 he made such disclosures, and the issue is not presently before  
18 the panel. Harrison does not argue that he made certain oral  
19 misrepresentations upon which Ballew justifiably relied, and then  
20 he made full disclosure in writing at closing in the Sellers'  
21 Disclosure Form or otherwise, which Ballew ignored. Presumably,  
22 had that been the case, Harrison would have raised the argument  
23 at trial and on appeal; he has failed to do so. Instead, he  
24 argues that, at closing, Ballew discovered the "as is" language  
25 and was given access to the title report for the first time and  
26 failed to review the same. Under the circumstances, the  
27 bankruptcy court's finding that Ballew's reliance was justified  
28 is not clearly erroneous.

1           **2. The Bankruptcy Court Did Not Err In Determining That**  
2           **Harrison's Representations Were The Proximate Cause Of**  
3           **The State Court Judgment Against Ballew In The Amount**  
4           **Of \$33,738.79**

5           To prevail on a § 523(a)(2) claim, the creditor must prove  
6           that he sustained the alleged loss and damage as the proximate  
7           result of the representations having been made. Britton v. Price  
8           (In re Britton), 950 F.2d 602, 604 (9th Cir. 1991).

9           Under Idaho law, proximate cause "has been defined as a  
10          cause which in natural and continuous sequence, unbroken by  
11          any efficient intervening cause, produces the result complained  
12          of and without which the result would not have occurred."  
13          Edward Motors, Inc. v. Twin Cities Toyota, Inc., 111 Idaho 846,  
14          849, 727 P.2d 1274 (Idaho Ct. App. 1986).

15          The bankruptcy court determined that all the money Ballew  
16          owed to Kildew was a direct consequence of Harrison's fraudulent  
17          actions. It further stated that had the note not been  
18          transferred, Ballew could have been relieved from any further  
19          obligation under the note.

20          In Britton, the debtor was an office manager who led  
21          patients to believe that he was a medical doctor and committed  
22          fraud in convincing a patient to submit to surgery. The Ninth  
23          Circuit determined that malpractice is a foreseeable consequence  
24          of any improper medical procedure. There was no policy argument  
25          to limit the extent of Britton's liabilities for the patient's  
26          injuries. Britton, 950 F.2d at 604. In this case, the bankruptcy  
27          court determined that "[i]t is of no significance that Plaintiff  
28          failed to make the payments on the note, or that he incurred

1 additional obligations for interest, attorney fees and costs  
2 under that note." Mem. Decision at 32, Feb. 10, 2006.

3 Where a seller of real property makes misrepresentations as  
4 to the condition of the real property to induce a buyer to  
5 purchase the real property, the consequence of such fraudulent  
6 transaction when the buyer discovers the true condition thereof,  
7 may be that the buyer ceases making payments on the mortgage as  
8 well as the note securing a second deed of trust on the real  
9 property resulting in a judgment against the buyer.

10 Of course, it is also a foreseeable consequence that a  
11 buyer, upon discovering the defects, may continue to pay the  
12 obligations and initiate litigation against the seller; however,  
13 that is not the only foreseeable consequence of such  
14 misrepresentation. As in Britton, there is no policy reason to  
15 limit the liability of Harrison for the injuries suffered by  
16 Ballew. A bankruptcy court is not required to "divine what might  
17 have happened" had the fraud not occurred. In re Siriani, 967  
18 F.2d 302, 306 (9th Cir. 1992).

19 Harrison argues that any amount of damages in excess of the  
20 original amount of the note operates as a penalty, which is  
21 prohibited under Siriani. Id. In Siriani, the court noted that  
22 the "creditor is allowed to recover only those damages caused by  
23 the fraud and is not entitled to a reward through the imposition  
24 of a penalty on the debtor." Id. (citing Jenner v. Hunter (In re  
25 Hunter), 771 F.2d 1126, 1128 (8th Cir. 1985)). However, the  
26 Supreme Court's holding in Cohen brings earlier Ninth Circuit  
27 cases into question with regard to the issue of "penalty" and  
28 disapproves certain lower court cases limiting liability. 523

1 U.S. at 213 (holding all liabilities that arose from fraud were  
2 nondischargeable under § 523(a)(2)(A)).

3 In this case, the amount of damages in excess of the note  
4 was a "direct consequence" of Harrison's conduct, as stated by  
5 the bankruptcy court. Any interest, penalties, fees, costs,  
6 acceleration and default provisions are directly set forth  
7 in the terms of the note, which was a note assigned to Kildew  
8 by Julie Harrison, the original lender. Section 523 also  
9 reflects the policy considerations that "the fresh start is for  
10 the 'honest but unfortunate debtor,' not the defrauder."  
11 Siriani, 967 F.2d at 306 (citations omitted). Accordingly, the  
12 increase in the amount of the judgment does not operate as a  
13 penalty on Harrison, and the bankruptcy court's finding of  
14 proximate cause was not clearly erroneous.

15 **3. The Bankruptcy Court Did Not Err In Determining**  
16 **That Harrison Was Not Entitled To Offset Of**  
**Damages**

17 Harrison contends that he is entitled to an offset of  
18 damages for: (1) the period of time that Ballew lived at 6912  
19 Petrie and did not pay the note and mortgage; and (2) the period  
20 of time in which Ballew collected rent from roommates while they  
21 resided at 6912 Petrie.

22 The bankruptcy court made the following findings:

23 Plaintiff has not claimed nor proven damages  
24 associated with any loss of equity as a result  
25 of his loss of 6912 Petrie Street to foreclosure.  
26 Were he still the owner of the property, he  
27 may have been able to show substantial damages  
28 when comparing the value of the property  
with a clean title to that with the boundary  
defects. And because Plaintiff will recover no  
damages for such a loss, Defendants' argument  
is that the Court should reduce any damages  
award by the amount of payments Plaintiff failed  
to make on his first and second mortgages



1 leading up to the foreclosure misses the mark.  
2 Also irrelevant in this analysis is any suggestion  
3 by Defendants that damages should be offset  
4 because Plaintiff occupied the house for an  
5 extended time without paying mortgage payments.  
6 Again, any value of Plaintiff's possession was  
7 offset, in the Court's view, by the fact that  
8 Plaintiff lost the property as a result of  
9 Mr. Harrison's conduct.

10 Mem. Decision at 34-35, Feb. 10, 2006.

11 The bankruptcy court made no specific finding of value  
12 attributed to possession, and the discussion of "any value" with  
13 respect to damages was merely speculative. The bankruptcy court  
14 indicated that Ballew's damages might have been substantially  
15 greater had he not lost 6912 Petrie in foreclosure due to  
16 Harrison's conduct. The bankruptcy court was not required to  
17 place a pecuniary value upon damages neither pled nor proven, and  
18 it did not do so.

19 Section 553(a) is applicable to setoff in bankruptcy and  
20 provides, in relevant part:

21 This title does not affect any right of  
22 a creditor to offset a mutual debt owing  
23 by such creditor to debtor that arose  
24 before the commencement of the case under  
25 this title against a claim of such creditor  
26 against the debtor that arose before the  
27 commencement of the case. . . .

28 11 U.S.C. § 553(a).

The burden to prove setoff rests upon the party asserting  
the same. In re County of Orange, 183 B.R. 609, 615 (Bankr.  
C.D. 1995) (citing United States v. Arkinson (In re Cascade  
Roads), 34 F.3d 756, 763 (9th Cir. 1994)). Mutuality of debt  
requires that: (1) debts must be in the same right; (2) debts  
must be between the same individuals; and (3) those same

1 individuals must stand in the same capacity. Id. (citing In re  
2 Visiting Home Serv., Inc., 643 F.2d 1356, 1360 (9th Cir. 1981)).

3 Section 553 requires mutuality of debt for setoff. Harrison  
4 contends, without any authority, that he is entitled to setoff  
5 (also known as offset) for the period during which Ballew  
6 occupied 6912 Petrie and failed to make payments on the note  
7 and the mortgage, specifically, from 2001 through 2003.

8 First, as the record reflects, Harrison was not the holder  
9 of either the first or second deed of trust securing the  
10 respective notes. The note securing the second deed of trust was  
11 transferred by Julie Harrison, holder of the note, to Kildew in  
12 May of 2000. Harrison was merely the seller of 6912 Petrie who  
13 collected the full purchase price from Ballew in September of  
14 1999. The bankruptcy court determined that Ballew did all that  
15 he could to mitigate the damages and that the damages would have  
16 likely been greater based upon loss of equity had Ballew retained  
17 the property.

18 Second, the bankruptcy court correctly determined that  
19 there should be no offset awarded to Harrison based on roommate  
20 rent (or contribution) collected by (or paid by) Ballew. The  
21 bankruptcy court did not err in denying the offset.

22 **CONCLUSION**

23 Based on the foregoing, we AFFIRM.  
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