

DEC 28 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP Nos.	EC-11-1138-KiDJu
		)		EC-11-1150-KiDJu
6	DARYL J. ROGERS; MONICA E. ROGERS,	)		(related appeals)
		)		
7		)	Adv. No.	09-02643
	Debtors.	)		
8	_____	)	Bk. No.	09-34525
		)		
9	HOWARD PATTERSON,	)		
		)		
10	Appellant,	)		
		)		
11	v.	)	<b>M E M O R A N D U M<sup>1</sup></b>	
		)		
12	DARYL J. ROGERS,	)		
		)		
13	Appellee.	)		
14	_____	)		

Argued and Submitted On November 16, 2011  
at Sacramento, California

Filed - December 28, 2011

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

Honorable Philip H. Brandt, Bankruptcy Judge, Presiding

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Appearances: Patricia Kramer of Neasham & Kramer LLP argued for  
appellant, Howard Patterson; Larry J. Cox of the  
Law Offices of Larry J. Cox argued for appellee,  
Daryl J. Rogers.

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Before: KIRSCHER, DUNN, and JURY, Bankruptcy Judges.

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<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.

1 Appellant, Howard Patterson ("Patterson"), filed a  
2 nondischargeability action against appellee, chapter 7<sup>2</sup> debtor  
3 Daryl J. Rogers ("Rogers"), seeking to except his debt from  
4 discharge under § 523(a)(2)(A). Patterson's fraud claim was  
5 based on two events in connection with a real estate deal between  
6 Patterson, Rogers, and Rogers's company, Gridiron Development,  
7 LLC. Patterson prevailed on his fraud action on what is referred  
8 to as the "2005 Release," but the bankruptcy court found no fraud  
9 existed as to the "2007 Release." In these related appeals,  
10 Patterson appeals the court's Third Amended Judgment with respect  
11 to the 2007 Release and the court's measure of damages, and he  
12 appeals the court's orders denying his second motion to  
13 alter/amend judgment and his motion for attorney's fees and  
14 costs. We AFFIRM in part and REVERSE in part.

## 15 I. FACTUAL AND PROCEDURAL HISTORY

### 16 A. Prepetition Facts.

#### 17 1. Events leading to the 2005 Release.

18 The following facts are undisputed. Rogers is a licensed  
19 real estate agent in California. As a Master Faculty Trainer,  
20 Rogers trains other real estate professionals in a broad range of  
21 subjects across the country through Keller Williams University.  
22 Patterson is a licensed general contractor with the state of  
23 California.

24 On or about May 6, 2005, Rogers entered into a written  
25 Vacant Land Purchase Agreement ("Purchase Agreement") with  
26 \_\_\_\_\_

27 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Patterson for the sale of certain real property commonly known as  
2 Heritage Park Estates, located in Loomis, California ("Heritage  
3 Park"). Heritage Park was subject to an approved Tentative  
4 Subdivision Map for Phases II and III, which allowed for 40  
5 individual lots to be created upon the approval and recordation  
6 of the Final Subdivision Map. The purchasers were Rogers and/or  
7 another entity, Eller Development, Inc. ("Eller Development"),  
8 which is located in Iowa and owned by Matt Eller ("Eller"), a  
9 long-time friend and business associate of Rogers.

10 On May 18, 2005, Rogers and Eller formed Gridiron  
11 Development, LLC ("Gridiron") for the sole purpose of developing  
12 Heritage Park. On or about June 15, 2005, Rogers and Patterson  
13 agreed to substitute Gridiron as "buyer" of Heritage Park. The  
14 purchase price for the property was \$4.5 million, with Patterson  
15 financing a \$1.5 million note at 8% interest. Patterson was also  
16 to be deeded back four of the Heritage Park lots once the Final  
17 Map was approved and recorded. UMPQUA Bank ("UMPQUA") also  
18 funded a first deed of trust loan for Heritage Park.

19 Keller Williams Auburn ("Keller Williams") represented  
20 Patterson in the sale. Keller Williams is the dba of Kay Dub U  
21 Auburn, LP., a California Limited Partnership in which Rogers has  
22 an ownership interest, and at the time of the sale had an  
23 employment relationship. Although Rogers is not a real estate  
24 broker, Wayne Hall, the broker for Keller Williams, designated  
25 Rogers to make virtually all of the decisions normally made by a  
26 broker for Keller Williams. Agent Ken Hendrickson facilitated  
27 the sale between Patterson and Rogers/Gridiron and received a  
28 commission of \$90,635.

1 Rogers and Eller made an initial deposit of \$1 million on  
2 Heritage Park. Rogers and Patterson then executed various  
3 addenda to the Purchase Agreement. Addendum 1, dated May 7,  
4 2005, provided for Patterson's seller financed deed of trust  
5 loan. It was to be secured by Heritage Park "or other property  
6 agreeable by both buyer and seller." A second Addendum 1 [sic],  
7 dated May 19, 2005, referenced Patterson's seller financed deed  
8 of trust loan and stated that it was now to be secured by  
9 "seller's position of \$500,000 . . . each in three separate  
10 buildings with lowest LTV of Ames Iowa development project." On  
11 May 27, 2005, Rogers and Eller, on behalf of Gridiron, executed a  
12 promissory note in favor of Patterson for \$1.5 million, which  
13 reflected the maturity date as "payable upon completion of  
14 Heritage Park Estates Project in Loomis, California or as  
15 otherwise agreed by the parties."

16 Eller Development owned what is a known as Parcel "A" of  
17 Lot "2" of the Seventh Addition to Dauntless Subdivision, located  
18 in Ames, Iowa (Parcel "A"). This property became known as the  
19 West Towne Condominiums ("West Towne"). West Towne consisted of  
20 seven three-story mixed use condominiums built on Parcel "A"  
21 between 2005 and 2007. On or about June 27, 2005, Patterson  
22 accepted security for his note in the form of a real estate  
23 mortgage, executed by Eller Development, in his favor for \$1.5  
24 million on three of the seven buildings on Parcel "A" - Buildings  
25 "A", "B" and "E" ("First Mortgage"). Before Patterson agreed to  
26 accept security in West Towne, Rogers told Patterson that he  
27 personally owned one of the buildings and that one of the  
28 buildings securing Patterson's loan was "free and clear." The

1 First Mortgage was recorded in Iowa on June 27, 2005. Sometime  
2 on or before June 27, 2005, Addendum 5 to the Purchase Agreement  
3 reflected that the loan balance due Patterson was \$1.1 million.  
4 Around that same time, a second [sic] Addendum 5 provided that:  
5 "Seller agrees to convey final 4 lots previously reserved for  
6 himself to buyer for sum of \$400,000. Total sales now include  
7 all 40 lots on the recorded Final Map."

8 Meanwhile, on June 16, 2005, Eller Development took out a  
9 loan from First National Bank of the Midwest for \$3.56 million on  
10 Building "E" (the "Midwest Mortgage"), one of the buildings  
11 securing Patterson's loan. The Midwest Mortgage was not recorded  
12 until July 18, 2005, after Patterson's First Mortgage had been  
13 recorded on June 27. Unbeknownst to Patterson, on July 19, 2005,  
14 the day after the Midwest Mortgage was recorded, Eller  
15 Development executed (but did not record) a Second Mortgage in  
16 favor of Patterson on the same three buildings located on Parcel  
17 "A" in the amount of \$1.5 million.

18 Neither Rogers nor Eller told Patterson that Eller had  
19 recorded the Midwest Mortgage against Building "E" after  
20 recording Patterson's First Mortgage. Instead, Rogers asked  
21 Patterson to execute a release of the First Mortgage to correct a  
22 "property description" error. Neither Rogers nor Eller told  
23 Patterson that if he released his mortgage, his security interest  
24 in West Towne would be subordinated to the Midwest Mortgage on  
25 Building "E" when the Second Mortgage was recorded.

26 Patterson executed the release of the First Mortgage on  
27 Buildings "A", "B" and "E" on July 28, 2005 (the "2005 Release"),  
28 because he believed and relied upon what Rogers had told him -

1 that it was necessary to correct the property description. Eller  
2 recorded the 2005 Release on August 8, 2005, and recorded the  
3 Second Mortgage the same day. When the 2005 Release was  
4 recorded, the Midwest Mortgage moved into first position on  
5 Building "E". As it turns out, no error existed in the property  
6 description requiring correction. Moreover, Rogers knew it was  
7 not necessary to release a mortgage to correct a property  
8 description. Patterson later learned that Rogers did not own a  
9 building in West Towne when he made that representation to  
10 Patterson in May 2005; Rogers did not purchase Building "D" until  
11 October 20, 2005.

12 Some payments, at least \$300,000, were made on Patterson's  
13 loan. Payments ceased, however, after June 2006. Shortly  
14 thereafter, Patterson traveled to Iowa to inspect West Towne. On  
15 September 26, 2006, Eller Development quitclaimed Buildings "A",  
16 "B" and "E" (which secured Patterson's loan) to Phinn LC, a  
17 company solely owned by Eller. From November 2006 through May  
18 2007, Patterson called Rogers frequently to inquire about payment  
19 on the loan. On each call, Rogers assured Patterson that payment  
20 would be forthcoming and that Patterson should not be concerned.  
21 Patterson agreed to Rogers's repeated requests to forebear from  
22 foreclosing on West Towne.

## 23 **2. Events leading to the 2007 Release.**

24 The following facts are largely undisputed. As of June 8,  
25 2007, Eller Development owned Buildings "C", "F" and "G", Phinn  
26 LC owned Buildings "A", "B" and "E", and Rogers owned Building  
27 "D". Although payments were not being made on the loans for West  
28 Towne, none of the Buildings were subject to judicial or non-

1 judicial foreclosure, and no notices of default had been  
2 recorded.

3       Between March and June 2007, Eller and Rogers actively  
4 marketed West Towne for sale and received several offers to  
5 purchase the property. Rogers did not tell Patterson that he and  
6 Eller intended to transact a short sale of Parcel "A" in June  
7 2007 or at any other time. On May 26, 2007, Rogers and Eller  
8 received an offer for approximately \$24 million for West Towne.  
9 Around this same time, Rogers told Patterson that West Towne was  
10 in "foreclosure" and that Patterson would lose everything unless  
11 he was willing to take alternate security for his loan. Just  
12 prior to this, on or about May 16, 2007, Rogers had proposed to  
13 Eller that if Patterson would release his security interest in  
14 West Towne, in exchange Gridiron would give Patterson a deed of  
15 trust on Heritage Park. However, the men were concerned about  
16 Gridiron investors losing their investment, so Rogers proposed  
17 giving Gridiron investors a second deed of trust to Heritage Park  
18 (behind UMPQUA and ahead of Patterson) in the amount of  
19 \$1.1 million, which was just under the approximate \$1.3 million  
20 of equity in the property. Below is an email exchange between  
21 Megan Tjernagel, an employee of Eller Development, and Rogers,  
22 dated May 16, 2007:

23       MEGAN: Have you had any luck obtaining a release from  
24       Howard on the West Towne property?

25       ROGERS: Once again, I need to talk with Matt. We never  
26       finish this conversation. If Howard releases, then what  
27       do we want to put it on as replacement? Right now he has  
28       a lien on West Towne and they aren't worth anything. I  
      prefer that to my home or [Heritage Park]. If he puts it  
      on [Heritage Park], then our investors are out of luck.  
      There is too much equity in [Heritage Park] and he could  
      foreclose and sell it cheap and get his money and we

1 would be out. So I proposed we find a way to have our  
2 1 million of equity in [Heritage Park] put on a second  
3 deed of trust after the bank's. Then we could have  
Howard go on as 3rd place. I am not sure if that is what  
Matt wants to do. Any other suggestions??

4 Rogers executed a second deed of trust on behalf of Gridiron in  
5 favor of Gridiron to secure its investors for \$1.1 million and  
6 sent it to Heidi Schwalbe of Alliance Title to record before  
7 Patterson's third deed of trust.

8 Based on Rogers's representation that West Towne was in  
9 foreclosure and worthless and that Patterson would fare better if  
10 he accepted a deed of trust on Heritage Park, Patterson  
11 ultimately agreed to release his Second Mortgage on West Towne  
12 (the "2007 Release"). In order to satisfy Patterson's concerns  
13 about signing the 2007 Release before he received the Heritage  
14 Park deed of trust, Rogers prepared and presented to Patterson an  
15 undated promissory note in the amount of \$1.4 million (the amount  
16 now owed on the original loan), to be secured by a deed of trust  
17 on Heritage Park, Rogers's personal residence, and Rogers's stock  
18 in Keller Williams.

19 According to Patterson, Rogers told him that the 2007  
20 Release had to be signed on June 8, 2007. Patterson appeared at  
21 Rogers's office on June 8, but Rogers was not there. An employee  
22 told Patterson that Rogers had been called to a family emergency.  
23 Other than the new unsigned note and the deed of trust to  
24 Heritage Park, no other documents were prepared for the security  
25 in Rogers's home or stock. While Patterson was at the office, he  
26 saw documents on the counter that indicated his interest in  
27 Heritage Park might be recorded in third position. Patterson  
28 proceeded to sign the 2007 Release.

1 Patterson went back to Rogers's office on the following  
2 Monday, June 11, 2007. He asked Rogers what was going on and  
3 demanded to know about the other security Rogers had promised him  
4 in his home and stock. Rogers replied that he never intended to  
5 give Patterson the additional security interest in either his  
6 home or his stock. Patterson objected to his third position on  
7 Heritage Park and demanded that Rogers not record the 2007  
8 Release. Rogers told Patterson that it was "too late" because he  
9 had already sent the 2007 Release to Iowa to be recorded.  
10 Patterson assumed, based on Rogers's representation, that it was  
11 too late to stop recordation of the 2007 Release.

12 No third deed of trust for Heritage Park in favor of  
13 Patterson was ever recorded. Patterson also never received the  
14 additional security in Rogers's home and stock, or any further  
15 payments on the loan. Due to the 2007 Release, Patterson did not  
16 receive notice of, and was not a participant in, the short sale  
17 by Eller Development, Phinn LC, and Rogers of West Towne. West  
18 Towne sold for \$20 million; Building "E" sold for \$2,787,754.70.

19 Patterson sued Rogers (and others) in state court on May 4,  
20 2009, for, inter alia, fraud, breach of contract, and breach of  
21 fiduciary duty. The suit was stayed as to Rogers on July 14,  
22 2009, when he filed his chapter 7 bankruptcy petition.

23 **B. Postpetition Facts.**

24 Patterson filed his nondischargeability complaint against  
25 Rogers on October 2, 2009, seeking to except from discharge his  
26 debt for damages suffered due to Rogers's alleged fraud under  
27 § 523(a)(2)(A). Patterson prayed for damages of \$1,754,666.67,  
28 the amount owed on the loan, punitive damages in the amount of

1 \$5 million, and attorney's fees and costs.

2 On February 5, 2010, Patterson moved for relief from stay to  
3 prosecute his fraud claim against Rogers in state court. The  
4 bankruptcy court denied Patterson's motion and ordered a trial  
5 limited to nondischargeability on liability for the fraud claim,  
6 reserving the issue of damages to the state court.

7 The bankruptcy court conducted a trial on Rogers's liability  
8 on November 8, 9, 10 and 12, 2010.<sup>3</sup> Rogers admitted telling  
9 Patterson that in exchange for the 2007 Release he would provide  
10 Patterson the additional security of his home and stock, besides  
11 a deed of trust in Heritage Park. However, according to Rogers,  
12 the undated note reflecting the additional security was only a  
13 "placeholder" to appease Patterson just in case the Heritage Park  
14 deed of trust did not arrive in time, prior to Patterson signing  
15 the 2007 Release. Rogers testified that he told Patterson the  
16 undated note was only a "placeholder," and that he told Patterson  
17 he never intended to give him the additional security. Rogers  
18 testified that as of June 8, 2007, he had no equity in his home.

19 Rogers further testified that the purpose of the 2007  
20 Release was to give Patterson some security in Heritage Park, as  
21 opposed to his leaving it on West Towne, which had no equity.  
22 According to Rogers, Eller wanted to leave Patterson's security  
23 in West Towne. Rogers denied telling Patterson that he had to  
24 sign the 2007 Release on June 8, 2007, but admitted that this was  
25 around the time the short sale on West Towne was taking place.

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26  
27 <sup>3</sup> Because the bankruptcy court entered judgment in favor of  
28 Patterson with respect to his debt in connection with the 2005  
Release and Rogers is not appealing that issue, we focus on the  
2007 Release and discuss the 2005 Release only where necessary.

1 Rogers testified that no proceeds from the short sale of West  
2 Towne were available beyond the first deeds of trust.

3 Patterson testified that prior to his signing the 2007  
4 Release, Rogers did not disclose that Patterson's deed of trust  
5 on Heritage Park would be in third position behind Gridiron  
6 investors. Patterson testified that Rogers never told him the  
7 value of the additional security of the home and stock, but they  
8 did discuss that Heritage Park had over \$1 million in equity, and  
9 Patterson assumed the home and stock had "some" value. Patterson  
10 also testified that Rogers never told him that the undated note  
11 was merely a "placeholder;" Patterson believed he was getting an  
12 interest in Heritage Park, plus Rogers's home and stock.

13 Contrary to Rogers's testimony, Eller testified that the  
14 purpose of the 2007 Release was to pay Patterson, and that he  
15 agreed with the decision to give Patterson a deed of trust in  
16 Heritage Park in exchange for the 2007 Release. Eller also  
17 testified that Heritage Park ultimately sold for only \$380,000.

18 The bankruptcy court announced its ruling in favor of Rogers  
19 on Patterson's complaint on December 13, 2010. The court found  
20 that no fraud existed as to either the 2005 Release or the 2007  
21 Release. As to the 2007 Release, the court found that Patterson  
22 never established that Rogers represented to Patterson that his  
23 position in Heritage Park would be something better than third  
24 position. As for the credibility of Patterson and Rogers, the  
25 court found that neither witness was more credible than the  
26 other. At the end of its oral ruling, the court articulated its  
27 belief that the measure of damages should be the value, if any,  
28 of the collateral Patterson released at the time, not the face

1 amount of the note. A judgment in favor of Rogers was entered  
2 that same day.

3 Patterson timely moved to alter/amend judgment, asking the  
4 court to find Rogers liable for fraud with respect to both  
5 Releases and that it strike any findings it made regarding the  
6 scope and/or measure of damages. At the hearing on that motion  
7 on January 27, 2011, the bankruptcy court reversed its decision  
8 in part, finding that Rogers was liable to Patterson for fraud  
9 based on the 2005 Release. It denied Patterson's motion with  
10 respect to the 2007 Release. As for damages, the court  
11 recognized that while the state court would be determining that  
12 issue, it remained of the view that the appropriate measure of  
13 nondischargeable damages was the loss in value of Patterson's  
14 security position caused by the 2005 Release and his loss of  
15 priority.

16 On January 27, 2011, the court entered an amended judgment  
17 in favor of Patterson based on the fraudulent 2005 Release. The  
18 amended judgment also set the measure of nondischargeable damages  
19 as the diminution, if any, in the value of Patterson's security  
20 as a result of the 2005 Release and Patterson's attendant loss of  
21 priority.

22 On February 10, 2011, Patterson timely filed a second motion  
23 to alter/amend judgment, contending that because the trial was  
24 limited to liability, the amended judgment erroneously imposed a  
25 measure of damages without a trial on the matter. On that same  
26 date, Patterson filed a motion for attorney's fees and costs

1 based on the fee provision in the Purchase Agreement.<sup>4</sup>

2 The bankruptcy court held a hearing on Patterson's second  
3 motion to alter/amend judgment and his motion for attorney's fees  
4 and costs on March 4, 2011. It denied Patterson's motion for  
5 fees and costs because his fraud claim based on the 2005 Release  
6 did not "arise out of" the Purchase Agreement. As for the  
7 damages issue, the court stated it was "very mindful of not  
8 wanting to direct the state court to do anything" or "preclud[e]  
9 the possibility that there might be other damages recoverable  
10 against other parties . . . ." Hr'g Tr. (Mar. 4. 2011) 24:21-22,  
11 24:19-21. Nonetheless, in its restated findings dated March 23,  
12 2011, the bankruptcy court found: "Defendant Daryl J. Rogers is  
13 liable to Plaintiff Howard Patterson for the resulting diminution  
14 in value of plaintiff's security for the Gridiron Development LLC  
15 note, and that liability is NONDISCHARGEABLE pursuant to  
16 11 U.S.C. § 523(a)(2)(A)."

17 The bankruptcy court issued two minute orders denying both  
18 of Patterson's motions on March 4, 2011. Patterson timely filed  
19 his notice of appeal of the minute orders. On March 23, 2011,  
20 the court entered formal orders denying Patterson's second motion  
21 to alter/amend judgment on the damages issue and his motion for  
22 attorney's fees and costs on March 23, 2011. A second amended  
23 judgment was also entered on March 23 to correct certain  
24 grammatical errors in the amended judgment.

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25  
26 <sup>4</sup> As the initial prevailing party, Rogers had moved for  
27 attorney's fees on the same basis as Patterson - under the fee  
28 provision in the Purchase Agreement. However, once Rogers was no  
longer the prevailing party, he took a contrary position in his  
opposition to Patterson's request for fees contending that no  
fees were available under the Purchase Agreement.

1 Patterson timely filed an amended notice of appeal regarding  
2 the March 23, 2011 rulings on April 1, 2011. On May 18, 2011,  
3 the bankruptcy court vacated the second amended judgment and  
4 entered a Third Amended Judgment awarding Patterson statutory  
5 costs as prevailing party.

6 Patterson timely filed his second amended notice of appeal  
7 on June 1, 2011, of the Third Amended Judgment, the bankruptcy  
8 court's Restated and Corrected Findings of Fact and Conclusions  
9 of Law with respect to its findings on the 2007 Release and the  
10 measure of damages, and the orders denying his second motion to  
11 alter/amend judgment and motion for attorney's fees and costs.

## 12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C.  
14 §§ 157(b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C.  
15 § 158.

## 16 **III. ISSUES**

- 17 1. Did the bankruptcy court clearly err in determining that no  
18 fraud existed as to the 2007 Release?
- 19 2. Did the bankruptcy court improperly limit Patterson's  
20 damages?
- 21 3. Did the bankruptcy court abuse its discretion in determining  
22 that Patterson was not entitled to attorney's fees and costs?

## 23 **IV. STANDARDS OF REVIEW**

24 In claims for nondischargeability, the Panel reviews the  
25 bankruptcy court's findings of fact for clear error and  
26 conclusions of law de novo and applies de novo review to "mixed  
27 questions" of law and fact that require consideration of legal  
28 concepts and the exercise of judgment about the values that

1 animate the legal principles. Oney v. Weinberg (In re Weinberg),  
2 410 B.R. 19, 28 (9th Cir. BAP 2009). Witness credibility  
3 findings are entitled to special deference and are also reviewed  
4 for clear error. In re Weinberg, 410 B.R. at 28; Rule 8013. A  
5 finding is clearly erroneous if it is illogical, implausible, or  
6 without support in the record. United States v. Hinkson,  
7 585 F.3d 1247, 1261 (9th Cir. 2009)(en banc). "When there are  
8 two permissible views of the evidence, the trial judge's choice  
9 between them cannot be clearly erroneous." Village Nurseries v.  
10 Gould (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP  
11 1999).

12 Whether the trial court selected the correct legal standard  
13 in computing damages is reviewed de novo. Mackie v. Rieser,  
14 296 F.3d 909, 916 (9th Cir. 2002).

15 Whether a state statute permits attorney's fees is reviewed  
16 de novo. Kona Enter. Inc. v. Estate of Bishop, 229 F.3d 877, 883  
17 (9th Cir. 2000). The denial of attorney's fees requested under  
18 state law is reviewed for an abuse of discretion or an erroneous  
19 application of the law. Renwick v. Bennett (In re Bennett),  
20 298 F.3d 1059, 1063 (9th Cir. 2002); Champion Produce, Inc. v.  
21 Ruby Robinson Co., 342 F.3d 1016, 1020 (9th Cir. 2003). To  
22 determine whether the bankruptcy court abused its discretion, we  
23 conduct a two-step inquiry: (1) we review de novo whether the  
24 bankruptcy court "identified the correct legal rule to apply to  
25 the relief requested" and (2) if it did, whether the bankruptcy  
26 court's application of the legal standard was illogical,  
27 implausible or "without support in inferences that may be drawn  
28 from the facts in the record." Hinkson, 585 F.3d at 1261-62.

1 V. DISCUSSION

2 **A. The bankruptcy court did not clearly err in finding that no**  
3 **fraud existed based on the 2007 Release.**

4 To prevail on a claim under § 523(a)(2)(A), a creditor must  
5 demonstrate five elements: (1) misrepresentation, fraudulent  
6 omission or deceptive conduct by the debtor; (2) knowledge of the  
7 falsity or deceptiveness of his statement or conduct; (3) an  
8 intent to deceive; (4) justifiable reliance by the creditor on  
9 the debtor's statement or conduct; and (5) damage to the creditor  
10 proximately caused by its reliance on the debtor's statement or  
11 conduct. In re Weinberg, 410 B.R. at 35 (citing Turtle Rock  
12 Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081,  
13 1085 (9th Cir. 2000)). "The creditor bears the burden of proof  
14 to establish all five of these elements by a preponderance of the  
15 evidence." Id. (citing In re Slyman, 234 F.3d at 1085).

16 We begin by noting the bankruptcy court found that neither  
17 of the men was more credible than the other. In its findings on  
18 December 13, 2010, the bankruptcy court found that no fraud  
19 existed as to the 2007 Release because Patterson failed to  
20 establish that Rogers ever represented to Patterson that he would  
21 be in second position on Heritage Park. Patterson's attempt to  
22 stop the transaction when he found out he would be in third  
23 position merely highlighted that no clear agreement existed on  
24 the security position. In the bankruptcy court's opinion, the  
25 lack of the additional security in Rogers's home and stock is not  
26 what caused the transaction to stop there; it was Patterson's  
27 third security position in Heritage Park.

28 The bankruptcy court made additional findings regarding the

1 2007 Release at the January 27, 2011 hearing on Patterson's  
2 motion to alter/amend judgment. Because the witnesses had  
3 "roughly equivalent credibility," the court found that the  
4 additional security of Rogers's home and stock could have been a  
5 placeholder as Rogers said and not intended for Patterson, but  
6 Patterson had failed to prove his case by a preponderance of the  
7 evidence on that issue. Hr'g Tr. (Jan. 27, 2011) 4:9-20.

8 Patterson contends the bankruptcy court clearly erred in  
9 finding that no fraud occurred as to the 2007 Release in light of  
10 the overwhelming evidence to the contrary. We disagree. Despite  
11 his statement to Patterson that West Towne was in foreclosure,  
12 which was false, Rogers's email to Megan Tjernagel reflects his  
13 belief at the time that West Towne had no value for Patterson,  
14 who was in second position due to the 2005 Release. In lieu of  
15 Patterson's Second Mortgage on West Towne, Rogers offered him a  
16 deed of trust on Heritage Park. Patterson testified that it was  
17 "his understanding" that his deed would be recorded in second  
18 position. Notably, and as the bankruptcy court found, Patterson  
19 did not establish that Rogers expressly told him he would be in  
20 second position on Heritage Park. As for whether Rogers  
21 represented to Patterson prior to the 2007 Release that he would  
22 give Patterson the additional security of the home and stock, or  
23 it was just a "placeholder" as Rogers claimed, the court found  
24 both witnesses equally credible on that issue, and thus Patterson  
25 failed to meet his burden that a false representation had been  
26 made. No deed of trust was ever recorded for Patterson on  
27 Heritage Park because Patterson directed Heidi Schwalbe not to  
28 record it unless he was placed in a second position.

1           In addition to the bankruptcy court's findings, we fail to  
2 see what damage was proximately caused by Patterson's 2007  
3 Release that he did not already suffer by the 2005 Release. In  
4 other words, what additional damages would Patterson be entitled  
5 to by the 2007 Release that he is not already entitled to due to  
6 the fraudulent 2005 Release? It appears that but-for the 2005  
7 Release, Patterson may have been paid in full on his note by  
8 being in first position on at least one of the buildings in West  
9 Towne. Thus, he may be able to establish damages as the full  
10 amount due on the note. The record is not clear, and Patterson  
11 has not articulated, what the 2007 Release would add to these  
12 damages. In any event, Eller testified that Heritage Park  
13 ultimately sold for only \$380,000. If true, then even if  
14 Patterson was in second position on Heritage Park, he would have  
15 received nothing, as UMPQUA's loan far exceeded that amount.  
16 Perhaps something of value could have been had on the additional  
17 security of Rogers's home and stock, but the bankruptcy court  
18 found that Patterson failed to meet his burden on whether he was  
19 ever entitled to that additional security. Moreover, the  
20 evidence established that no equity existed in Rogers's home at  
21 the time of the 2007 Release, and no value was ever provided in  
22 the record for the stock. Patterson admitted that Rogers never  
23 told him the value of the additional security in Rogers's home or  
24 stock.

25           We also fail to see how Patterson, who at the time of the  
26 2007 Release believed he was in first position on West Towne and  
27 apparently unaware of his second position due to the 2005  
28 Release, justifiably relied on any representation by Rogers that

1 the West Towne property was in foreclosure. Surely, Patterson  
2 had not commenced any foreclosure proceedings on West Towne, and  
3 as the first position lienholder, he would have received notice  
4 of any foreclosure proceedings by a junior.

5 Accordingly, we cannot conclude on this record that the  
6 bankruptcy court's finding that no fraud existed as to the 2007  
7 Release was illogical, implausible, or without support in the  
8 record viewed in its entirety. Hinkson, 585 F.3d at 1261-62.  
9 Even if we as the fact finder would have weighed the evidence  
10 differently, "when there are two permissible views of the  
11 evidence, the trial judge's choice between them cannot be clearly  
12 erroneous." In re Baldwin Builders, 232 B.R. at 410. We AFFIRM  
13 this portion of the Third Amended Judgment and the bankruptcy  
14 court's order denying Patterson's second motion to alter/amend  
15 judgment on this issue.

16 **B. The bankruptcy court erred in limiting Patterson's damages.**

17 While the parties and the bankruptcy court agreed that the  
18 state court would determine Patterson's damages, if any, the  
19 Third Amended Judgment reads in relevant part:

20 The liability of defendant, Daryl J. Rogers to plaintiff  
21 Howard Patterson for the diminution, if any, in value of  
22 his security for the note of Gridiron Development LLC  
23 dated May 27, 2005, to him . . . as a result of the  
24 release dated July 28, 2005 . . . , of the mortgage  
initially granted by Eller Development, Inc., to secure  
that note . . . , and Mr. Patterson's attendant loss of  
priority, is NONDISCHARGEABLE pursuant to 11 U.S.C.  
§ 523(a)(2)(A).

25 Patterson contends that although the bankruptcy court had to  
26 find some damage proximately caused by Rogers's fraudulent  
27 conduct to establish liability for fraud, the court improperly  
28 made a finding regarding the scope of damages without permitting

1 the parties a trial on the issue. We agree.

2 The record reflects the bankruptcy court's clear concern  
3 about crafting a judgment that did not limit Patterson's or any  
4 other party's damages. However, we conclude the language in the  
5 Third Amended Judgment is an improper limitation on Patterson's  
6 damages. It essentially precludes the state court from  
7 determining whether Patterson suffered any consequential or  
8 punitive damages, which he prayed for in his nondischargeability  
9 complaint. At the very least, it appears to render such damages,  
10 should the state court find any, dischargeable. This is contrary  
11 to Cohen v. de la Cruz, 523 U.S. 213 (1998)(holding that any  
12 debts incurred as a result of debtor's fraud, including  
13 attorney's fees or punitive damages, are nondischargeable).

14 As further error, the bankruptcy court did not articulate on  
15 what authority it was limiting Patterson's damages. At this  
16 point, it is unclear whether California or Iowa law would apply  
17 to this issue, which may dictate different results. Accordingly,  
18 we REVERSE the damages portion of the Third Amended Judgment to  
19 the extent it imposes any limitation on Patterson's damages.

20 **C. The bankruptcy court did not abuse its discretion in denying**  
21 **Patterson's motion for attorney's fees and costs.**

22 The bankruptcy court found that Patterson was the  
23 prevailing party in his nondischargeability action. Rogers does  
24 not contest that finding. However, the court rejected  
25 Patterson's argument for attorney's fees and costs based on the  
26 fee provision in the Purchase Agreement, concluding that the  
27 Agreement was fully performed and Patterson's fraud claim did not  
28 "arise out of" it:

1 So it seems to me once you've got the fully performed  
2 contract and the fraud that's established does not relate  
3 to the performance of that contract, rather to a note  
4 received in payment and the security for that note under  
5 that contract, I just don't see how it arises out of the  
6 original purchase and sale agreement.

7 . . . .  
8 But the connection is too tenuous for me to conclude that  
9 the fraud in the release of the security arises out of  
10 the original agreement.

11 Hr'g Tr. (Mar. 4, 2011) 17:22-18:3, 18:6-9.

12 Patterson contends the bankruptcy court erred in determining  
13 his fraud claim did not "arise out of" the Purchase Agreement.  
14 In Patterson's view, the Purchase Agreement was the sine qua  
15 non for the 2005 purchase-sale itself, the 2005 First Mortgage,  
16 the 2005 Release, which was obtained fraudulently, and the Second  
17 Mortgage. In other words, the Purchase Agreement is the "but  
18 for" to the entire transaction between the parties.

19 While no independent right exists to attorney's fees under  
20 the Bankruptcy Code, a prevailing party may be awarded attorney's  
21 fees in a nondischargeability action if such fees are recoverable  
22 outside of bankruptcy under state or federal law. Fry v. Dinan  
23 (In re Dinan), 448 B.R. 775, 785 (9th Cir. BAP 2011)(citing  
24 Cohen, 523 U.S. at 223). California law permits recovery for  
25 attorney's fees under two separate provisions.

26 California Civil Code ("CCP") § 1717<sup>5</sup> is narrowly applied

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27 <sup>5</sup> CCP § 1717 provides:

28 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

(continued...)

1 and allows a party to recover attorney's fees only if the action  
2 involves litigation of a contract claim. Redwood Theaters, Inc.  
3 v. Davison (In re Davison), 289 B.R. 716, 723 (9th Cir. BAP 2003)  
4 (citing Santisas v. Goodin, 951 P.2d 399, 409 (Cal. 1998)).  
5 Because Patterson's nondischargeability action was based entirely  
6 on the tort of fraud, CCP § 1717 is inapplicable. Santisas,  
7 951 P.2d at 409; Xuereb v. Marcus & Millichap, Inc., 5 Cal. Rptr.  
8 2d 154, 157 (Cal. Ct. App. 1992).

9       Nonetheless, CCP § 1021<sup>6</sup> permits recovery of attorney's fees  
10 by agreement between the parties and does not limit a fee  
11 recovery to actions on the contract. In re Davison, 289 B.R. at  
12 724. Thus, attorney's fees may be recoverable under CCP § 1021  
13 even though they are not recoverable under CCP § 1717. Id.  
14 (citing 3250 Wilshire Blvd. Bldg. v. W.R. Grace & Co., 990 F.2d  
15 487, 489 (9th Cir. 1993)). If an attorney's fee provision exists  
16 in an agreement between the parties, the court looks to the  
17 agreement's language to determine whether an award of attorney's  
18 fees is permitted in a tort action. Id.

19       The fee provision in paragraph 27 of the Purchase Agreement  
20 reads in relevant part:

21  
22 \_\_\_\_\_  
23       <sup>5</sup>(...continued)  
24       is determined to be the party prevailing on the contract,  
25       whether he or she is the party specified in the contract or  
26       not, shall be entitled to reasonable attorney's fees in  
27       addition to other costs (emphasis added).

28       <sup>6</sup> CCP § 1021 provides in relevant part:

      Except as attorney's fees are specifically provided for by  
      statute, the measure and mode of compensation of attorneys  
      . . . is left to the agreement, express or implied, of the  
      parties . . . .

1        In any action, proceeding, or arbitration between Buyer  
2        and Seller arising out of this Agreement, the prevailing  
3        Buyer or Seller shall be entitled to reasonable attorney  
      fees and costs from the non-prevailing party Buyer or  
      Seller . . . . (emphasis added).

4        A contract provision authorizing fees in an action to interpret  
5        or enforce the contract does not permit attorney's fees on tort  
6        claims. Scientists, 951 P.2d at 414 n.9; Exxess Electronixx v.  
7        Heger Realty Corp., 75 Cal. Rptr. 2d. 376, 383 (Cal. Ct. App.  
8        1998); In re Davison, 289 B.R. at 725. However, the fee  
9        provision at issue here is not so limiting. California courts  
10       have held that contractual language providing for fees in any  
11       action arising from, or relating to, the contract is broad enough  
12       to encompass recovery of attorney's fees for tort actions.  
13       Scientists, 951 P.2d at 405; Xuereb, 5 Cal. Rptr. 2d at 157; Gil  
14       v. Mansano, 17 Cal. Rptr. 3d 420, 423 (Cal. Ct. App. 2004).

15        The bankruptcy court appeared to recognize that Patterson,  
16        as prevailing party, could be entitled to attorney's fees for his  
17        tort action against Rogers based on the broad language of the  
18        Purchase Agreement. However, it ultimately concluded that  
19        Patterson's claim for fraud against Rogers for the 2005 Release  
20        did not "arise out of" the Purchase Agreement.

21        Whether Patterson is entitled to attorney's fees turns on  
22        whether his nondischargeability action for fraud entailed an  
23        action "arising out of" the Purchase Agreement.

24        "To answer this question, we apply the ordinary rules  
25        of contract interpretation. 'Under statutory rules of  
26        contract interpretation, the mutual intention of the  
27        parties at the time the contract is formed governs  
28        interpretation. . . . Such intent is to be inferred,  
      if possible, solely from the written provisions of the  
      contract. . . . The "clear and explicit" meaning of  
      these provisions, interpreted in their "ordinary and  
      popular sense," unless "used by the parties in a

1 technical sense or a special meaning is given to them  
2 by usage" . . . , controls judicial  
3 interpretation. . . . Thus, if the meaning a layperson  
would ascribe to contract language is not ambiguous, we  
apply that meaning. . . ."

4 Exxess Electronixx, 75 Cal. Rptr. 2d at 383 (quoting Scientists,  
5 951 P.2d at 405 (citations omitted)).

6 The parties do not claim they ascribed to the phrase  
7 "arising out of" a particular or special meaning. Accordingly,  
8 we must interpret that phrase in its ordinary and popular sense.  
9 To "arise" means "to originate from a source" or "to come into  
10 being or to attention." Merriam-Webster's Collegiate Dictionary  
11 62 (10th ed. 2000). Did Patterson's fraud claim based on the  
12 2005 Release "arise out of" the Purchase Agreement? We conclude  
13 that it did not. We agree with the bankruptcy court's finding  
14 that the Purchase Agreement was fully performed upon the close of  
15 escrow. The fraud occurred after that date. No necessary causal  
16 connection exists between Patterson's release of his First  
17 Mortgage in West Towne in 2005 and the Purchase Agreement.  
18 Patterson's fraud claim arose from his role as lender to  
19 Gridiron, not as the seller in the Purchase Agreement for  
20 Heritage Park. Therefore, Patterson's cause of action did not  
21 "arise from" the Purchase Agreement; it was independent of that  
22 basic contractual arrangement.<sup>7</sup>

23 \_\_\_\_\_  
24 <sup>7</sup> We further observe that paragraph 22 in the Purchase  
25 Agreement regarding dispute resolution contains similar but  
broader language than that in paragraph 27:

26 Buyer and Seller agree to mediate any dispute or claim  
27 arising between them out of the Agreement, or any  
resulting transaction, before resorting to arbitration  
28 or court action.

(continued...)

1 Perhaps the First Mortgage, which contains an attorney's fee  
2 provision, may be a source of recovery for Patterson. However,  
3 as the bankruptcy court noted, the First Mortgage was signed by  
4 Eller Development, a company in which Rogers apparently has no  
5 interest. We further observe that Iowa law would likely apply to  
6 the attorney's fee provision in the First Mortgage, and neither  
7 party ever presented any Iowa law on this issue. Moreover, the  
8 attorney's fee provision in the promissory note, which is subject  
9 to California law, appears to apply only to actions enforcing the  
10 note.<sup>8</sup>

11 Accordingly, we conclude that the bankruptcy court did not  
12 abuse its discretion in determining Patterson was not entitled to  
13 attorney's fees based on the Purchase Agreement.

#### 14 VI. CONCLUSION

15 We AFFIRM the bankruptcy court's Third Amended Judgment,  
16 except to the extent it imposed any limitation on Patterson's  
17 damages. We REVERSE the damages portion of the Third Amended  
18 Judgment, as the issue on the scope and amount of damages will be  
19 decided by the state court. We AFFIRM the bankruptcy court's  
20 order denying Patterson's motion for attorney's fees and costs.  
21  
22

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23 <sup>7</sup>(...continued)

24 Based on this broader language in paragraph 22, one might  
25 conclude that the intent of the parties in paragraph 27 was to  
26 restrict attorney's fees to matters pertaining only to the  
Agreement, not later resulting transactions such as releases and  
recordings of deeds of trust.

27 <sup>8</sup> The note's fee provision states: "The undersigned  
28 [Gridiron], in case of suit on this note, agrees to pay  
attorney's fees" (emphasis added).