

JAN 31 2017

SUSAN M. SPRAUL, 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NOT FOR PUBLICATION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. SC-15-1204-FYJu
)
 JOSEPH ZENOVIC,) Bk. No. 13-07230-LT7
)
 Debtor.) Adv. Pro. 13-90218-LT
)
)
 JOSEPH ZENOVIC,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 MALCOLM CRUMP, as Trustee of)
 the Malcolm A. and S'anta Lou)
 Crump Family Trust UTD)
 12/10/87; S'ANTA LOU CRUMP,)
 as Trustee of the Malcolm A.)
 and S'anta Lou Crump Family)
 Trust UTD 12/10/87; ANGELA)
 CRUMP,)
)
 Appellees.)

Argued and Submitted on January 19, 2017
at San Diego, California

Filed - January 31, 2017

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

Honorable Laura S. Taylor, Chief Bankruptcy Judge, Presiding

Appearances: Kerry Todd Curry of Curry & Associates argued on
behalf of Appellant Joseph Zenovic; Jason M.
Santana argued on behalf of Appellees Malcolm A.
Crump, S'anta Lou Crump, and Angela Crump.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, see Fed. R. App. P. 32.1, it has no precedential value, see
9th Cir. BAP Rule 8024-1.

1 Before: FARIS, YUN,** and JURY, Bankruptcy Judges.

2 **INTRODUCTION**

3 Chapter 7¹ debtor Joseph Zenovic appeals from the bankruptcy
4 court's judgment following trial determining that appellees
5 Malcolm, S'anta Lou, and Angela Crump hold a nondischargeable
6 claim in the amount of \$266,481.64. He does not challenge the
7 court's finding of liability or determination of
8 nondischargeability, but rather only disputes the bankruptcy
9 court's calculation of damages. We agree with the bankruptcy
10 court's application of California's seven percent prejudgment
11 interest rate, rather than the much lower federal rate. However,
12 we hold that the bankruptcy court erred in valuing certain real
13 property for the purpose of calculating the damages claim.
14 Accordingly, we AFFIRM IN PART, REVERSE IN PART, and REMAND to
15 enter judgment consistent with this decision.

16 **FACTUAL BACKGROUND**

17 **A. The Crumps and their desire to build an eldercare facility**

18 Malcolm and S'anta Crump, a married couple, their adult
19 daughter, Angela, and several extended family members owned
20 interests in an income-producing commercial property. In 2008,
21 the family decided to sell the property, and each of the Crumps
22

23 ** The Honorable Scott H. Yun, United States Bankruptcy
24 Judge for the Central District of California, sitting by
25 designation.

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 expected to receive a substantial cash distribution.

2 In order to replace the lost rental income, Mr. Crump,
3 Mrs. Crump, and Angela decided to seek a replacement rental
4 property in Ramona, California. They contacted Mrs. Crump's
5 friend and real estate broker, Karen Clendenen. Ms. Clendenen
6 suggested that the Crumps participate in an exchange under
7 section 1031 of the Internal Revenue Code in order to defer
8 capital gains taxes.

9 After considering several properties, Mrs. Crump shifted her
10 focus to building and operating an eldercare facility. At this
11 point, Ms. Clendenen introduced her to Mr. Zenovic, with whom she
12 shared office space.

13 Ms. Clendenen introduced Mr. Zenovic as a general contractor
14 with experience on projects in the Ramona area. Mr. Zenovic told
15 Mrs. Crump that his company, Meadow Builders, owned two parcels
16 of contiguous real property (the "Property") in Ramona totaling
17 1.3 acres. Mr. Zenovic represented to her that the Property was
18 suitable for her needs and "buildable and ready to go."

19 After a number of meetings with Mr. Zenovic and
20 Ms. Clendenen, the Crumps decided to purchase the Property and
21 hire Mr. Zenovic as the general contractor to construct an
22 eldercare facility on the Property. In fact, neither Mr. Zenovic
23 nor Meadow Builders held a general contractor's license in the
24 state of California.

25 **B. The purchase contracts**

26 Ms. Clendenen represented both the Crumps and Mr. Zenovic
27 and drafted the relevant contracts: a Vacant Land Purchase
28 Agreement ("Purchase Agreement"), an addendum ("Addendum") to the

1 Purchase Agreement, and a second Vacant Land Purchase Agreement
2 ("Second Purchase Agreement"). Unfortunately, she drafted the
3 contracts ineptly.

4 The Purchase Agreement, which Ms. Clendenen prepared using a
5 standard form from the California Association of Realtors,
6 provided that the Crumps would purchase the larger of the two
7 parcels comprising the Property for a purchase price of \$641,000.

8 The Second Purchase Agreement identified the smaller parcel
9 comprising the Property and a purchase price of \$115,000.

10 The Addendum cryptically provided as follows:

11 Purchase price to include the following:

- 12 1. Landscape = \$20,000
- 13 2. Road Improvements - \$15,000
- 14 3. Furniture - \$20,000
- 15 4. Sewer construction - \$36,000
- 16 5. \$400,000 for cost of approx. 2600 sq. ft. home
- 17 6. Lot with 2 APN #-281-452-04-00 and 281-443-17-00

18 There will be a separate agreement between Buyer
19 and Seller on APN # 281-443-17-00 for \$115,000 to
20 close as part of this transaction. Seller to pay
total amount toward Buyers [sic] bills (to be
determined by Buyer)[.]

21 Buyer will be closing escrow on land only.
22 Construction to start once escrow is closed on
23 land. Total purchase price to be \$641,000 to
include construction and cost above.

24 The testimony at trial and the bankruptcy court's findings
25 explain that the contracts provided for \$491,000 in construction
26 costs and \$150,000 for the cost of the Property, totaling
27 \$641,000. The Crumps paid Mr. Zenovic a total of \$756,000 but
28 received an immediate refund of \$115,000 less escrow fees. (This

1 was the ostensible purchase price for the smaller lot, which
2 proceeds the Seller was to use to pay the Buyer's bills.)² Title
3 to both lots would pass to the Crumps at closing, and Mr. Zenovic
4 agreed to build a home after the closing.

5 **C. Mr. Zenovic's failure to construct the eldercare facility**

6 In December 2008, the parties executed the Purchase
7 Agreements. Escrow closed later that month, and the monies were
8 wired into Mr. Zenovic's bank account.

9 Mr. Zenovic did not even begin to construct the eldercare
10 facility. Rather, he used the Crumps' money to pay unrelated
11 personal and business debts. By April 2009, he had depleted
12 almost all of those funds. The bankruptcy court rejected
13 Mr. Zenovic's attempts to explain this away, and he does not
14 appeal this aspect of the bankruptcy court's decision.

15 Over the next year, Mr. Zenovic repeatedly put off the
16 Crumps' questions regarding the start of construction. The
17 Crumps finally learned in February 2010 that the eldercare
18 facility could not be constructed on the Property because it was
19 nearly impossible to obtain a sewer permit to service the
20 Property. They discovered that, since 2006, Mr. Zenovic had
21 attempted to obtain a sewer permit from the Ramona Municipal
22 Water District but had failed.

23 In September and November 2010, the Crumps wrote to
24 Mr. Zenovic, demanding a financial accounting, but he refused to

25
26 ² The bankruptcy court questioned the propriety of this
27 treatment. It is likely that this cash payment to the Crumps had
28 an adverse effect on the Crumps' efforts to defer capital gains
tax, but it had no adverse effect on Mr. Zenovic and therefore is
not relevant to this appeal.

1 provide any information.

2 **D. Litigation in state court and bankruptcy court**

3 In October 2011, the Crumps sued Mr. Zenovic, Meadow
4 Builders, and Ms. Clendenen and her employer in San Diego
5 Superior Court (the "State Court Action"). Their allegations
6 against Mr. Zenovic included a fraud claim. After nearly two
7 years of litigating the State Court Action, and about two weeks
8 before the start of trial, Mr. Zenovic filed his chapter 7
9 petition.

10 Around the same time, the Crumps settled with Ms. Clendenen
11 and her employer (the "Realtor Defendants") for \$498,000. The
12 Crumps received the settlement payment in October 2013.

13 The Crumps filed an adversary complaint against Mr. Zenovic
14 on August 16, 2013, asserting that their claim was
15 nondischargeable under §§ 523(a)(2)(A) and (a)(6).

16 **E. The adversary proceeding trial and closing briefs**

17 The bankruptcy court conducted a six-day trial in December
18 2014. Among other things, the Crumps introduced the testimony of
19 a real estate agent who had been trying to sell the Property for
20 a year and a half. She testified that she had reduced the asking
21 price several times and that it was currently offered at \$79,900.
22 The Crumps offered no other evidence of the value of the Property
23 at trial.

24 The parties filed closing briefs, in which they discussed
25 the proper measure of damages. The Crumps argued that the court
26 should enter judgment totaling \$264,660.05. Their reasoning was
27 as follows:

28 (1) Excluding prejudgment interest, the Crumps' out-of-

1 pocket losses totaled **\$566,925.96**, which consisted of
2 construction costs totaling \$491,000, third-party payments
3 totaling \$4,925.96, and decrease in the Property's value totaling
4 \$71,000 (\$150,000 purchase price minus \$79,000 current value).

5 (2) Mr. Zenovic was entitled to a credit against his
6 liability for the **\$498,000** settlement that the Crumps received
7 from the Realtor Defendants.

8 (3) The Crumps were entitled to prejudgment interest at
9 seven percent per annum totaling **\$195,743.09**. They calculated
10 prejudgment interest in two time periods:

11 (a) December 2008 (closing of transaction) to October
12 2013 (receipt of settlement funds from the Realtor Defendants).

13 \$562,000 (\$491K construction costs + \$71K real property)
14 $\times \quad 7\%$ (interest rate per annum)

15 \$39,340 (interest per year (or \$3,278.33 per month))

16 \$3,278.33 (interest per month)
17 $\times \quad 58$ months (Dec. 2008 - Oct. 2013)
\$190,143.14 - interest accrued Dec. 2008 - Oct. 2013

18 (b) November 2013 to January 2015 (entry of judgment).

19 \$64,000 (damages after \$562K is reduced by \$498K)
20 $\times \quad 7\%$ (interest rate per annum)

21 \$4,480 (interest per year (or \$373.33 per month))

22 \$373.33 (interest per month)
23 $\times \quad 15$ months (Nov. 2013 - Jan. 2015)
\$5,599.95 - interest accrued Nov. 2013 - Jan. 2015

24 In sum, the Crumps added the principal damages and
25 prejudgment interest, then subtracted the settlement credit:

26 \$566,925.96 (damages)
27 $+\$195,743.09$ (prejudgment interest)

28 \$762,669.05
 $-\$498,000.00$ (settlement credit)

\$264,669.05 - total damages

In contrast, Mr. Zenovic argued that the Crumps had been

1 fully compensated by the settlement with the Realtor Defendants
2 and were not entitled to recover anything from him. He claimed
3 that their damages prior to the settlement with the Realtor
4 Defendants totaled only \$376,959.24.³ When the \$498,000
5 settlement was subtracted, the Crumps were allegedly "ahead" by
6 \$121,040.76. Mr. Zenovic claimed that the Crumps also saved an
7 additional \$205,295 that they would have had to spend on building
8 permits and related costs, so they were actually "ahead" by a
9 total of \$326,335.76.

10 Mr. Zenovic also argued that the Crumps had failed to offer
11 evidence of the value of the Property at the time the Purchase
12 Agreement was executed in December 2008. He said that the
13 current value of the Property was irrelevant and that any decline
14 in property value was due to the Great Recession and not his
15 conduct. He further contended that the Crumps did nothing to
16 sell the Property after deciding in late 2010 that they did not
17 want to proceed with construction of the eldercare facility.

18 Mr. Zenovic did not substantively discuss the applicable
19 prejudgment interest rate in his closing brief.

20 **F. The bankruptcy court's ruling and damages award**

21 The bankruptcy court made an oral ruling and also issued
22 written findings of fact and conclusions of law. It explained
23 that the oral and written rulings should be read together.

24
25 ³ Mr. Zenovic claimed that the Crumps paid him \$756,000
26 between the Purchase Agreement (\$641,000) and Second Purchase
27 Agreement (\$115,000). They received the Property back (the
28 larger parcel valued at \$150,000 and the smaller parcel valued at
\$115,000) as well as a cash rebate of \$114,040.76, for a total
offset of \$379,040.76. As such, he claimed that their damages
were \$376,959.24.

1 The bankruptcy court determined that Mr. Zenovic committed
2 fraud and that the judgment was nondischargeable under
3 § 523(a)(2)(A). It said that Mr. Zenovic misrepresented material
4 facts, including his status as a general contractor, the status
5 of the Property (including the sewer issues), and the status of
6 the construction payment. It also found that Mr. Zenovic made
7 the false statements knowingly and with an intent to deceive the
8 Crumps and that the Crumps relied on the statements and suffered
9 injury. The court found Mr. Zenovic's testimony not credible and
10 rejected each of his excuses and defenses. Mr. Zenovic does not
11 challenge any of these findings on appeal.

12 Regarding damages, the bankruptcy court held that the Crumps
13 were entitled to a nondischargeable judgment in the amount of
14 \$68,925.96.⁴ The court adopted the prejudgment interest
15 calculation suggested by the Crumps in their closing brief.

16 The bankruptcy court utilized the California prejudgment
17 interest rate, which was seven percent. It said that the
18 equities supported using the higher state rate.

19 The bankruptcy court issued its judgment on June 19, 2015,
20 at which time damages and prejudgment interest totaled
21 \$266,481.64.

22 Mr. Zenovic timely filed his notice of appeal.

23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

25
26 ⁴ The court calculated the contract price minus the current
27 value of the Property minus the settlement with the Realtor
28 Defendants as \$64,000 (\$641,000 - \$79,000 - \$498,000 = \$64,000).
The court then added the \$4,925.96 third-party costs for a total
of \$68,925.96.

1 §§ 1334 and 157(b)(1) and (2)(I). We have jurisdiction under
2 28 U.S.C. § 158.⁵

3 **ISSUES**

4 (1) Whether the bankruptcy court erred in determining the
5 value of the Property for the purpose of calculating damages.

6 (2) Whether the bankruptcy court erred in selecting the
7 applicable prejudgment interest rate.

8 **STANDARDS OF REVIEW**

9 We review legal issues de novo and the bankruptcy court's
10 factual findings under a clearly erroneous standard. Village
11 Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 409-10
12 (9th Cir. BAP 1999).

13 "[W]e review the legal standards used in the calculation of
14 damages de novo." R.B. Matthews, Inc. v. Transamerica Transp.
15 Servs., Inc., 945 F.2d 269, 272 (9th Cir. 1991) (citing Galindo
16 v. Stody Co., 793 F.2d 1502, 1516 (9th Cir. 1986)); see Oswalt
17 v. Resolute Indus., Inc., 642 F.3d 856, 859-60 (9th Cir. 2011)
18 ("We review de novo the legal conclusion that damages are
19 available and review for clear error factual findings underlying
20 the damages award."). De novo review is independent and gives no
21 deference to the trial court's conclusion. Roth v. Educ. Credit
22 Mgmt. Agency (In re Roth), 490 B.R. 908, 915 (9th Cir. BAP 2013).

23 We review the bankruptcy court's prejudgment interest award
24 for abuse of discretion. Simeonoff v. Hiner, 249 F.3d 883, 894
25

26 ⁵ The BAP clerk's office determined that the judgment was
27 interlocutory inasmuch as it did not dispose of the Crumps'
28 § 523(a)(6) claim. Mr. Zenovic thereafter requested and obtained
from the bankruptcy court a Civil Rule 54(b) determination.

1 (9th Cir. 2001); see von Gunten v. Neilson (In re Slatkin),
2 243 F. App'x 255, 259 (9th Cir. 2007) (“[t]he award of
3 pre-judgment interest is within the sound discretion of the trial
4 court”). To determine whether the bankruptcy court abused its
5 discretion, we conduct a two-step inquiry: (1) we review de novo
6 whether the bankruptcy court “identified the correct legal rule
7 to apply to the relief requested” and (2) if it did, whether the
8 bankruptcy court’s application of the legal standard was
9 illogical, implausible, or “without support in inferences that
10 may be drawn from the facts in the record.” United States v.
11 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

12 We may affirm the bankruptcy court on any basis supported by
13 the record. Heilman v. Heilman (In re Heilman), 430 B.R. 213,
14 216 (9th Cir. BAP 2010).

15 DISCUSSION

16 **A. The bankruptcy court erred in determining damages when it** 17 **valued the Property as of the date of trial.**

18 Mr. Zenovic contends that the bankruptcy court erred in its
19 damages calculation by not valuing the Property correctly. We
20 disagree with most of his reasoning but agree with his
21 conclusion. The bankruptcy court valued the Property as of the
22 trial date. Instead, the court should have valued the Property
23 at an earlier date.

24 A court must award damages to sufficiently compensate the
25 plaintiffs for out-of-pocket losses that they have suffered.
26 Section § 3343(a) of the California Civil Code provides that a
27 person “defrauded in the purchase, sale or exchange of property
28 is entitled to recover the difference between the actual value of

1 that with which the defrauded person parted and the actual value
2 of that which he received” Cal. Civ. Code § 3343; see
3 Ambassador Hotel Co. v. Wei-Chuan Inv., 189 F.3d 1017, 1032 (9th
4 Cir. 1999) (“The California Legislature has specifically provided
5 that the victim of fraud in the sale, purchase or exchange of
6 property may recover only out-of-pocket losses plus certain
7 additional damages[.]”); Kenly v. Ukegawa, 16 Cal. App. 4th 49,
8 53 n.2 (1993) (“under the out-of-pocket approach, the defrauded
9 party receives only the difference between the value of the
10 property received and the amount he paid”).

11 Generally, “out-of-pocket damages are calculated as of the
12 time of the transaction[.]” Ambassador Hotel Co., 189 F.3d at
13 1032; see Burkett v. J.A. Thompson & Son, 150 Cal. App. 2d 523,
14 527 (1957) (“He was entitled to recover the ‘out-of-pocket loss,’
15 or the difference between the price [the buyer] paid and the
16 actual value at the time she made the purchase.”). But
17 subsequent events can sometimes illuminate the property’s value
18 at the date of the transfer:

19 the plaintiff should receive as damages the difference
20 in value between everything with which he parted and
21 everything he received, and the statute contains
22 nothing to show that the difference must be calculated
23 solely on the basis of the facts existing at the time
24 the contract was made or performed. The section must
25 be applied realistically so as to give the defrauded
26 person his actual out-of-pocket loss, and, where
27 necessary to reach that result, the court must consider
28 subsequent circumstances.

25 Garrett v. Perry, 53 Cal. 2d 178, 184 (1959).

26 In the present case, the Crumps entered into the purchase
27 contracts with Mr. Zenovic in December 2008. The Crumps obtained
28 title to the Property when escrow closed thirty days later. At

1 that point, the Crumps owned the Property and were free to sell
2 or dispose of the Property as they wished. The bankruptcy court
3 could have chosen the closing date as an appropriate date to
4 value the Property. See Rivera v. Johnson, No. E051949, 2012 WL
5 831879, at *9 (Cal. Ct. App. Mar. 12, 2012) (unpublished) (“in
6 determining whether [buyer] has suffered compensatory damages,
7 the actual value of the property at the time of the sale is a
8 material issue of fact”).

9 The bankruptcy court also might reasonably have chosen a
10 somewhat later date to more accurately compensate the Crumps for
11 their out-of-pocket losses. For example, the bankruptcy court
12 might have found that a reasonable person in the Crumps’ position
13 would not have sold the Property until such person realized that
14 Mr. Zenovic was not going to build the house as promised. Such a
15 finding could justify a later valuation date. Accord generally
16 Garrett, 53 Cal. 2d at 184 (“section [3343] must be applied
17 realistically so as to give the defrauded person his actual
18 out-of-pocket loss, and, where necessary to reach that result,
19 the court must consider subsequent circumstances”); Feckenscher
20 v. Gamble, 12 Cal. 2d 482, 500 (1938) (“Although there was some
21 equity in the property which plaintiff acquired in the trade at
22 the time she actually acquired it, yet by reason of one of the
23 misrepresentations made to her to the effect that the trust deed
24 was not immediately due, she lost the entire property by a sale
25 under the trust deed, so that it can reasonably be said that she
26 actually received nothing of value from the transaction.”).

27 Mr. Zenovic’s own authority supports this view. In his
28 opening brief, he cites the Restatement (Second) of Torts § 548A

1 in support of his argument that he is not liable for subsequent
2 losses suffered by the Crumps. But comment b states:

3 the matter misrepresented must be considered in the
4 light of its tendency to cause those losses and the
5 likelihood that they will follow. Thus **one who**
6 **misrepresents the financial condition of a corporation**
7 **in order to sell its stock will become liable to a**
8 **purchaser who relies upon the misinformation for the**
9 **loss that he sustains when the facts as to the finances**
10 **of the corporation become generally known and as a**
11 **result the value of the shares is depreciated on the**
12 **market, because that is the obviously foreseeable**
13 **result of the facts misrepresented.**

14 Restatement (Second) of Torts § 548A (1977) (emphasis added).

15 Similarly, any decline in the value of the Property between the
16 date of the sale and the time its deficiencies were discovered
17 might have been a foreseeable result of his fraudulent conduct.

18 He should not be rewarded for his deception, and a valuation date
19 that considers the effect of his fraud might be appropriate.⁶

20 But here the bankruptcy court fixed the value of the
21 Property as of the date of trial, about six years after the
22 Crumps obtained title to the Property and long after they had
23 realized that Mr. Zenovic was not going to do what he promised.
24 Neither the Crumps nor the bankruptcy court explained why the

25 ⁶ Mr. Zenovic contends that the Property should be valued at
26 the price specified for the land under the purchase contracts,
27 which was \$265,000. We reject this argument. Mr. Zenovic does
28 not challenge on appeal the bankruptcy court's findings that he
defrauded the Crumps by, among other things, misrepresenting the
buildable status of the Property. If the Crumps had known the
true status of the Property, there is every reason to think that
they would not have agreed to the stipulated price. Mr. Zenovic
is not entitled to the benefit of a contract price that was
infected with his fraudulent misrepresentations.

1 date of trial was an appropriate date for this purpose.⁷

2 The danger of using an unduly late valuation date is that it
3 might subject the defendant to liability for losses that the
4 defendant did not cause. As a general rule, “[a] fraudulent
5 misrepresentation is a legal cause of a pecuniary loss resulting
6 from action or inaction in reliance upon it if, but only if, the
7 loss might reasonably be expected to result from the reliance.”
8 Restatement (Second) of Torts § 548A. “Pecuniary losses that
9 could not reasonably be expected to result from the
10 misrepresentation are, in general, not legally caused by it and
11 are beyond the scope of the maker’s liability.” Id. at cmt. b.
12 Delaying the valuation date could result in a damages award that
13 forces the wrongdoer to compensate the victim for losses that the
14 wrongdoer did not cause, such as declines in the general market.

15 Accordingly, the bankruptcy court erred when it fixed the
16 actual value of the Property at the time of trial.

17 The Crumps did not present any evidence at trial of the
18 value of the Property either at the time they received it or when
19 they discovered Mr. Zenovic’s fraud. They bore the burden of
20 proving the amount of their damages. See Saunders v. Taylor,
21 42 Cal. App. 4th 1538, 1543 (Cal Ct. App. 1996). Because they
22 failed to carry their burden to prove their damages, they are not
23 entitled to damages for the loss in value of the Property.

24
25
26 ⁷ At oral argument, when asked by the Panel why the trial
27 date was correct, counsel for the Crumps merely said that this
28 later date benefitted Mr. Zenovic because the Property probably
gained value between 2010 and the trial date. No evidence in the
record supports this assertion.

1 **B. The bankruptcy court did not err in determining that the**
2 **California prejudgment interest rate of seven percent was**
3 **appropriate.**

4 Mr. Zenovic argues that the bankruptcy court erred in
5 applying California's seven percent prejudgment interest rate,
6 rather than the lower federal rate (which was 0.4 percent when
7 the bankruptcy court entered its judgment). He does not
8 challenge the imposition of prejudgment interest, but only the
9 rate of interest that the bankruptcy court selected. Although we
10 do not agree with all of the bankruptcy court's reasons to use
11 the higher interest rate, we discern no abuse of discretion.⁸

12 The court may award prejudgment interest in consideration of
13 the equities of the case. "Awards of pre-judgment interest are
14 governed by considerations of fairness and are awarded when it is
15 necessary to make the wronged party whole." Purcell v. United
16 States, 1 F.3d 932, 942-43 (9th Cir. 1993) (citation omitted).
17 Prejudgment interest is intended "to compensate for the loss of
18 use of money due as damages from the time the claim accrues until
19 judgment is entered." Barnard v. Theobald, 721 F.3d 1069, 1078

20 ⁸ The bankruptcy court said that the federal rate was
21 inadequate because the Crumps intended to use the Property as an
22 income-producing eldercare facility. But there is no evidence in
23 the record to show that the Property would have returned a
24 profit, much less a seven percent return on investment.

25 The bankruptcy court also reasoned that California's strong
26 public policy and laws against unlicensed contractors
27 warranted the state interest rate. This is inconsistent with the
28 Ninth Circuit's admonition that "[p]rejudgment interest is an
element of compensation, not a penalty. Although a defendant's
bad faith conduct may influence whether a court awards
prejudgment interest, it should not influence the rate of the
interest." Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974,
988 (9th Cir. 2001).

1 (9th Cir. 2013). Whether to award prejudgment interest is in
2 "the district court's sound discretion." Id.

3 The correct rate of prejudgment interest in federal court
4 depends on the nature of the claims. "'Prejudgment interest is a
5 substantive aspect of a plaintiff's claim, rather than a merely
6 procedural mechanism.' . . . State law generally governs awards
7 of prejudgment interest in diversity actions, but federal law may
8 apply to the calculation of prejudgment interest when a
9 substantive claim derives from federal law alone." Oak Harbor
10 Freight Lines, Inc. v. Sears Roebuck, & Co., 513 F.3d 949, 961
11 (9th Cir. 2008) (quoting Sea Hawk Seafoods, Inc. v. Exxon Corp.
12 (In re the Exxon Valdez), 484 F.3d 1098, 1101 (9th Cir. 2007)).
13 Even in a federal question case, where the federal interest rate
14 ordinarily applies, the court may choose a different rate if "the
15 equities of a particular case demand a different rate.'" S.E.C.
16 v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1099 (9th Cir.
17 2010) (citation omitted); see United States v. Gordon, 393 F.3d
18 1044, 1063 n.12 (9th Cir. 2004) ("Under federal law the rate of
19 prejudgment interest is the Treasury Bill rate as defined in
20 28 U.S.C. § 1961 unless the district court finds on substantial
21 evidence that a different prejudgment interest rate is
22 appropriate.").

23 In the present case, the bankruptcy court chose to use the
24 California rate of seven percent. We think that this rate was
25 appropriate in this case.

26 Section 523 cases often require bankruptcy courts to decide
27 both state law and federal law issues. In order to decide such a
28 case, the bankruptcy court must first decide that the debtor owes

1 a "debt." In this case, as in most such cases, the "debt"
2 alleged by the Crumps is entirely a creature of state law. Next,
3 the bankruptcy court must determine whether that debt meets the
4 standard for nondischargeability. This second question depends
5 on federal law. But in cases based on § 523(a)(2), such as this
6 one, the state law and federal law issues are often identical.
7 This is so because § 523(a)(2) applies to debts for "false
8 pretenses, a false representation, or actual fraud," and the
9 Supreme Court has held that these terms must be given their
10 standard common law meanings. Husky Int'l Elecs., Inc. v. Ritz,
11 136 S. Ct. 1581, 1586 (2016); Field v. Mans, 516 U.S. 59, 69-70
12 (1995). As the bankruptcy court noted, a claim under
13 § 523(a)(2)(A) alleging fraud may be analyzed as a claim for
14 fraud in the inducement under California law. "The elements of
15 fraud under § 523(a)(2)(A) match the elements of common law fraud
16 and of actual fraud under California law." Lee v. Tcast
17 Commc'ns, Inc. (In re Jung Sup Lee), 335 B.R. 130, 136 (9th Cir.
18 BAP 2005) (citation omitted). Thus, this case is analogous to a
19 diversity case in which a federal court decides state law claims.
20 In such a case, the bankruptcy court may choose to award
21 prejudgment interest at the state law rate.

22 Mr. Zenovic cites several cases in which the federal court
23 declined to utilize the state court prejudgment interest rate.
24 However, those cases are either not binding authority or are
25 readily distinguishable; none of them stand for the proposition
26 that a bankruptcy court deciding a state law issue as a precursor
27 to the underlying bankruptcy law question must use the federal
28 prejudgment interest rate.

1 We also think that Mr. Zenovic's argument, if accepted,
2 would create an incentive to forum shop. As Mr. Zenovic points
3 out, the State Court Action was only about two weeks away from
4 trial when he filed his bankruptcy petition. He says that the
5 Crumps could have moved for relief from the automatic stay to
6 permit the trial to go forward. He confidently asserts that the
7 bankruptcy court would have granted that motion. He points out
8 that, if that had all happened, the state court would have
9 allowed prejudgment interest at the state law rate. Mr. Zenovic
10 has more confidence in his predictive capacities than we have in
11 ours, but his argument nicely makes the point that, if he is
12 right, he saved himself substantial amounts of interest on a
13 nondischargeable judgment by filing his bankruptcy case. It
14 would be inequitable to allow Mr. Zenovic to benefit from forum
15 shopping. See generally Kukulka-Stone v. Ekrem (In re Ekrem),
16 192 B.R. 982, 997 (Bankr. C.D. Cal. 1996) (the debtor "should not
17 be rewarded with the lower federal rate because this case was
18 litigated in a federal bankruptcy court"). In these
19 circumstances, we think that the bankruptcy court did not abuse
20 its discretion when it held that prejudgment interest at the
21 federal rate would confer a windfall upon Mr. Zenovic.

22 **C. The Crumps are entitled to a nondischargeable award of**
23 **\$164,047.82.**

24 We therefore accept the seven percent prejudgment interest
25 rate but adjust the court's damages award to exclude damages for
26 loss of property value.

27 Rather than remanding this issue for the bankruptcy court to
28 recalculate the final award, we have undertaken the calculations

1 ourselves. "Most of the changes we have made involved
2 arithmetical calculations that we could perform as easily as the
3 trial court and a remand would necessarily have involved a waste
4 of judicial resources." Felder v. United States, 543 F.2d 657,
5 671 (9th Cir. 1976) (also stating that "[t]he interests of
6 justice and the best interest of the parties require that we
7 recalculate the damages on the basis of the record before us and
8 order the entry of a modified judgment"); see Six (6) Mexican
9 Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1310 (9th Cir.
10 1990) ("Our exercise of this discretion [to recalculate an award
11 prior to remand] is particularly appropriate where recalculation
12 involves issues that we are equally situated to decide.");
13 28 U.S.C. § 2106 ("any other court of appellate jurisdiction may
14 affirm, modify, vacate, set aside or reverse any judgment,
15 decree, or order of a court lawfully brought before it for
16 review, and may remand the cause and direct the entry of such
17 appropriate judgment, decree, or order, or require such further
18 proceedings to be had as may be just under the circumstances").

19 The reduced award is calculated as follows using the
20 bankruptcy court's methodology (which the Crumps originally
21 proposed):

22 (1) Out-of-pocket losses: $\$491,000 + \$4,925.96 = \mathbf{\$495,925.96}$

23 (2) Prejudgment interest at 7% on \$491,000 from December
24 2008 through October 2013: **\$166,121.86**

25 (3) Settlement credit: **\$498,000**

26 We apply the Realtor Defendants' settlement credit first
27 against the principal damages (rather than the pre-October 2013
28 prejudgment interest), as directed by Newby v. Vroman, 11 Cal.

1 App. 4th 283 (Cal. Ct. App. 1992). In calculating prejudgment
2 interest following a settlement with some of the defendants, the
3 California appellate court stated, "the plaintiff is entitled to
4 further prejudgment interest from the nonsettling defendants only
5 **on the remaining principal balance of the judgment after its**
6 **reduction by such settlement amount."** 11 Cal. App. 4th at 290
7 (emphasis added); see Transwest Capital, Inc. v. Cashless
8 Concepts, Inc., No. 1:12-cv-00049-SAB, 2013 WL 4460240, at *4
9 (E.D. Cal. Aug. 16, 2013) (relying on Newby and subtracting the
10 settlement amount from the principal damages amount, then
11 calculating post-settlement prejudgment interest on the remaining
12 principal damages).

13 In this case, the Realtor Defendants' settlement payment of
14 \$498,000 in October 2013 was greater than the Crumps' principal
15 damages of \$495,925.96. Accordingly, there is no principal
16 damage award after October 2013, and we do not award prejudgment
17 interest after that date.

18 Thus, the total award is calculated by adding the principal
19 damages and the prejudgment interest, then subtracting the
20 settlement credit:

21 \$495,925.96
22 +\$166,121.86
23 \$662,047.82
24 -\$498,000.00
25 **\$164,047.82**

26 We therefore award the Crumps \$164,047.82.

27 CONCLUSION

28 For the reasons set forth above, the bankruptcy court did
not err in awarding the Crumps seven percent prejudgment
interest, but erred in determining the value of the Property.

1 Therefore, we AFFIRM IN PART, REVERSE IN PART, and REMAND to the
2 bankruptcy court to enter judgment consistent with this decision.

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