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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE VICTOR RAY BLATZER, Debtor.	BAP No. CO-09-024
LINDA RYAN, Plaintiff – Appellee, v. VICTOR RAY BLATZER, Defendant – Appellant.	Bankr. No. 07-10869-MER Adv. No. 07-01309-MER Chapter 7 OPINION*

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

Before CORNISH, Chief Judge, RASURE, and KARLIN, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument. Debtor, Victor Ray Blatzer ("Debtor"), appeals the Bankruptcy Court's ruling that the claim against him by appellee Linda Ryan ("Ryan") is non-dischargeable in

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

bankruptcy, pursuant to 11 U.S.C. § 523(a)(2)(A).[1] We affirm.

I. BACKGROUND

Debtor and Ryan, though not married, were involved in a long-term relationship and together have a daughter. They began living together in the summer of 1995, and amicably separated in September 2003. While together, they jointly purchased a residence,[2] as co-owners, and each became liable for payment of the debt that was secured by a mortgage on the property. Debtor claims that he refinanced the residence in 2001 and became solely obligated on the mortgage under the refinance. Ryan testified that she did not recall the 2001 refinancing, and the Bankruptcy Court did not mention it in the findings.

Later in 2001, Debtor lost his job, where his salary had exceeded $100,000 annually. According to Debtor, he and Ryan continued to enjoy the same lifestyle despite the loss of his job, doing so by relying upon $20,000 in severance money Debtor received from his former employer, his 401k account, and credit cards. Beginning in 2003, Debtor periodically obtained other employment, at a significantly reduced income, working two security jobs and as a laborer. By the time Ryan left in 2003, Debtor claimed that he and Ryan had "maxed out" several credit cards and that he had Ryan removed from the accounts to prevent her continued use of them.

At some point after Ryan left, Debtor began attempts to refinance the residence. He testified that he needed to refinance in order to both lower his

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[1] Unless otherwise specified, all further statutory references will be to Title 11 of the United States Code.

[2] There was a dispute at trial, which the Bankruptcy Court did not resolve, regarding the down payment made on the jointly purchased house. Debtor testified that he made the entire $25,000 down payment with funds from the sale of a previous house in which Ryan had no interest. Ryan testified that she paid $5,000 of the down payment. This discrepancy does not appear to have been significant to the Bankruptcy Court, and we do not consider it to be significant to the appeal.

monthly payments and pay some debts on which he had been receiving demands. However, the lender refused to refinance if Ryan's name remained on the title to the property. Therefore, Debtor approached Ryan in February 2004 and requested that she quit claim her interest in the property to him. Both parties testified that Debtor told Ryan that he needed her interest terminated in order to refinance the house, and that he needed to refinance in order to lower the monthly mortgage payments.

Debtor testified that he also told Ryan that he needed to pay some other bills, and that the refinancing was necessary to prevent him from losing the house. Ryan testified that Debtor told her only that he needed to lower his mortgage payments. However, in response to the question, "So you figured he was in financial trouble?" Ryan replied, "Well, if he said he needed to lower the payments and it was a struggle for him, yeah. I mean, he said he needed to lower the payments, that it was a struggle for him."[3]

At the time of the parties' conversation, Debtor had already received a commitment to refinance the existing $219,000 mortgage with one in the amount of $256,000, contingent on the release of Ryan's interest in the property. The commitment, if consummated, would result in a reduction by $200/month in Debtor's mortgage payment, and in Debtor's receipt of $25,743.25 cash for him to use in any way he wished. The loan closing was initially set for February 23, but was continued because Debtor had not yet obtained Ryan's release. Both parties testified that Ryan neither asked any specific questions about the terms of the refinancing nor did she seek to review any loan documents.[4] Ryan did not ask either what the appraised value had been after a recent appraisal, or to see the

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[3] *January 28, 2009, Trial Transcript* ("*Tr.*"), at 90, *ll.* 7-10, *in* Victor Ray Blatzer Opening Brief Appendix ("App.") at 104.

[4] *Id.* at 27-28, *in* App. at 41-42.

appraisal itself, instead relying on Debtor's representation that there was $40,000 equity in the real property.[5] She also did not ask Debtor the amount remaining due under the existing loan or the amount of the new note, and made no effort to determine Debtor's ability to continue paying the mortgage, despite her awareness that "it was a struggle for him."

Both parties agree that, in response to her question about what equity existed in the house, Debtor told Ryan that there was "about $40,000." Ryan responded that she believed she was entitled to 25% of that equity, or $10,000. As a result, Debtor agreed to sign a promissory note in that amount in exchange for Ryan's release of her interest in the property.

The promissory note that Debtor ultimately signed was created by Ryan from some internet source, and she did not request that this $40,000 note be secured by the property.[6] No evidence received at trial demonstrates that Ryan made any attempt, from the time she left the property in September 2003 until she was approached by Debtor in February 2004, to protect her interest in the property, or to assure that Debtor was paying the underlying mortgage.

Debtor signed the $10,000 promissory note prepared by Ryan on February 25, and in exchange, Ryan signed a quit claim deed. The note was interest free for a period of five years, payable on Debtor's sale of the house or in five years,[7] whichever occurred first.

When Debtor received the $25,000 cash at closing, he testified he used the money to make mortgage payments and to pay other debts. The number or

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[5] *See* n.25, *infra*, for a discussion about information Debtor had showing a much higher valuation, and thus equity, in the real property.

[6] *Tr.* at 29-30, *in* App. at 43-44.

[7] Although the promissory note was admitted at trial, it is not part of the appellate record. However, the terms of the note were generally discussed by the parties at trial. *See Tr.* at 19, *ll.* 6-25; 31, *ll.* 9-14; 64-65, *ll.* 10-25, 1-21; & 67, *ll.* 2-4, *in* App. at 33, 45, 78-79, & 81.

amount of payments made on the new note was not disclosed, but in any event, the new note was foreclosed in June 2006, and Debtor filed his bankruptcy petition on February 7, 2007. No evidence was received at trial indicating whether Debtor received any excess money, after payment of the mortgage, from the foreclosure sale.

II. STANDARD OF REVIEW

This is primarily a sufficiency of the evidence case, which is reviewed using the "clearly erroneous" standard.[8] However, to the extent that some of the issues discussed herein may be considered mixed questions of law and fact, they are reviewed "under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."[9] Finally, we review the Bankruptcy Court's determination of implied consent to amendment of a claim under an abuse of discretion standard.[10]

III. DISCUSSION

In order to prove her claim non-dischargeable under § 523(a)(2)(A), Ryan was required to establish the following five elements, by a preponderance of the evidence:

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[8] *In re BYOC Int'l, Inc.*, 233 B.R. 176, 1998 WL 780435, at *2 (10th Cir. BAP 1998) (sufficiency of the evidence is reviewed under a clearly erroneous standard, and trial court's decision need not be "correct," only "permissible").

[9] *Armstrong v. Comm'r,* 15 F.3d 970, 973 (10th Cir. 1994).

[10] *Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1163 (10th Cir. 1999).

1. a false representation;

2. made with intent to defraud;

3. that she relied upon;

4. justifiably; and

5. that resulted in damage to her.[11]

Initially, however, we must consider whether Ryan's complaint sufficiently identified the factual basis for her fraud claim, and/or whether Debtor effectively consented to Ryan's change in the factual basis of her claim at trial.

A. Implied Consent

The factual basis of Ryan's fraud claim, as initially pled, and up to the day of trial in the parties' Joint Pretrial Statement, was that

> [Debtor] misrepresented the status of the [refinance] closing. He failed to disclose that the closing had already taken place but had not yet been funded by the mortgage company. He also failed to disclose that he had misrepresented to the mortgage company that he was the sole owner of the Residence.

Significantly, Ryan never alleged that the fraud committed by Debtor consisted of "withdrawal of equity" from the residence in connection with the refinance. In fact, none of her original allegations were even pursued by Ryan at trial.

Rule 9(b) of the Federal Rule of Civil Procedure[12] provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Ryan's contention, first raised at trial, that Debtor's failure to disclose he was removing all equity from the house by receiving cash from the refinancing, had never appeared in any complaint or

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[11] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996). "Moreover, the scienter requirement of subsection (A) may be established by material omissions." *Columbia State Bank, N.A. v. Daviscourt (In re Daviscourt)*, 353 B.R. 674, 685 (10th Cir. BAP 2006).

[12] This rule is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7009.

pretrial order. However, Federal Rule of Civil Procedure 15(b)(2)[13] allows previously unpleaded issues to be tried by express or implied consent:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The Bankruptcy Court relied on this provision to find that Debtor had impliedly consented to try Ryan's new theory of fraud and, as noted earlier, this determination is reviewed only for abuse of discretion.[14]

Debtor asserts that Rule 15(b)(2) is inapplicable because he did object at trial to the new fraud basis asserted by Ryan. Unfortunately for Debtor, however, although his counsel asserted, during opening statement and closing argument, that Ryan's theory of fraud had changed, he did not contemporaneously object to the new theory at any point during the actual presentation of evidence, nor did he ever ask the Bankruptcy Court for a ruling on the objection until the conclusion of the trial. Debtor's counsel's limited statements on the issue at the beginning of trial were that, "[n]othing in the complaint here alleges the facts that [Ryan's counsel] has mentioned,"[15] and "[n]one of the things that are alleged in the complaint which we were on notice about . . . are false."[16]

Debtor's counsel neither orally moved to limit evidence to the facts previously pled, nor did he seek a continuance of the trial so that he could prepare for the new allegations. Subsequently, after all evidence had been presented,

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[13] This rule is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7015.

[14] *Moncrief*, 174 F.3d at 1163.

[15] *Tr.* at 11, *ll.* 4-5, *in* App. at 25.

[16] *Id.* at 11, *ll.* 21-23, *in* App. at 25.

Debtor's counsel once again protested that Ryan had not previously asserted her new fraud claim—removal of equity from the property, stating:

> DEBTOR'S COUNSEL: [The] complaint as plead basically puts on notice of one basic misrepresentation, misrepresented the status of closing. That's what the accusation in the amending (sic) complaint says. It says, "he failed to disclose that the closing had already taken place, but had not yet been funded by the mortgage company." There's no evidence to support that allegation in the complaint.
>
> This Court and the Federal Rules have liberal rules concerning the amending of the complaint and even at that (sic) close of the evidence counsel did not make a motion to amend the complaint and add his current theories about - - here's where the fraud is. You didn't tell us about the money that you were getting as proceeds of the refinancing. Didn't tell us that. Those documents and that analysis has been there for months. No amendments, no notice, and so for that reason I'm going to ask the Court to disregard that theory.[17]

The Bankruptcy Court determined that these statements were insufficient to constitute a proper "objection" under Rule 15(b). That decision is not an abuse of discretion.

In this Circuit, a litigant "impliedly consents to the trial of an issue not contained within the pleadings either by introducing evidence on the new issue or by failing to object when the opposing party introduces such evidence."[18] Under this standard, mere argument to the effect that the theory of the case had changed, without contemporaneously objecting at any point to the actual introduction of evidence in support of that theory, does not satisfy Rule 15(b).

Rule 103 of the Federal Rules of Evidence provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and "[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground was not apparent from the

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[17] *Tr.* at 95, *ll.* 5-20, *in* App. at 109.

[18] *Green Country Food Mkt., Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1280 (10th Cir. 2004).

context."[19] The purpose of the timely objection requirement is to ensure that "the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures."[20] To this end, the Tenth Circuit Court of Appeals has consistently held that evidentiary objections must generally be made at the time the evidence is actually offered.[21] The need for a contemporaneous objection has been upheld even where the offered evidence was not properly produced until immediately before trial.[22]

The goal of Rule 15 is to allow claims and defenses to be decided on their merits, rather than on procedural technicalities.[23] As such, a number of courts have allowed amendment when the policy in favor of rendering a merits decision outweighs the policy behind preventing surprise at trial.[24] In this case, Debtor contends that he was surprised at trial, and that the surprise precluded an adequate defense to Ryan's claim. It is equally likely, however, that Debtor knew exactly what Ryan's claim "should have been" and hoped her failure to state it correctly would doom her claim. Whichever the case, Debtor's failure either to contemporaneously object to the actual admission of evidence, or to request a continuance once the new theory was made express at trial, deprived the Bankruptcy Court the opportunity to make a meaningful and timely decision on

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19 Fed. R. Evid. 103(a), (b).

20 Fed. R. Evid. 103(a) advisory committee's note.

21 *See, e.g., Sorensen v. City of Aurora*, 984 F.2d 349, 355 (10th Cir.1993); *Pandit v. Am. Honda Motor Co., Inc.*, 82 F.3d 376, 379 (10th Cir. 1996) (requiring contemporaneous objection so a definitive ruling can be made).

22 *Glenn v Cessna Aircraft Co.*, 32 F3d 1462, 1465-1466 (10th Cir. 1994) (evidence properly admitted where there was not contemporaneous objection to it).

23 *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982).

24 *See* cases discussed in *Hardin*, 691 F.2d at 456 n.6.

either basis.

Moreover, although Debtor may have been "surprised" that Ryan had changed her theory, he was neither factually nor legally surprised by that change. Debtor was undeniably privy to all of the relevant refinance facts, including whether or not he removed equity in connection with the refinancing. Furthermore, Ryan neither changed the legal basis for her claim, § 523(a)(2)(A), nor introduced any evidence of which Debtor was not already aware. Under these circumstances, any prejudice Debtor may have suffered as a result of Ryan's "surprise" change in theory was, at most, minimal. His failure to properly object at trial, along with his participation in the trial on the new theory, supports the Bankruptcy Court's conclusion that Debtor did indeed "consent" to amendment of Ryan's claim. We therefore affirm the Bankruptcy Court's conclusion that Debtor impliedly consented to the amendment of Ryan's claim at trial.

B. False statement/Fraudulent intent

The Bankruptcy Court found that Debtor's representations to Ryan that he needed to refinance to lower his monthly payments, and that the home had approximately $40,000 in equity before the refinance, were both true.[25] However,

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[25] On appeal, Debtor relies heavily on a property appraisal indicating that the property was actually worth $300,000 shortly before the refinance. That appraisal was not offered into evidence at trial, however, and thus may not be used to support Debtor's claims in this appeal. In any event, even taken at face value, the appraisal is both supportive of, and detrimental to, Debtor's position. On one hand, this evidence could have supported Debtor's claim that he did not remove all of the equity from the property in connection with the refinance. On the other, it could buttress Ryan's claim that Debtor intended to defraud her, as he told her the equity was $40,000 when he had this appraisal in hand, and it showed more than $80,000 equity. Debtor's reliance on the appraisal on appeal may suggest that his failure to offer it into evidence at trial was due to the surprise of Ryan's new theory. However, it is equally likely that Debtor simply chose not to offer the appraisal into evidence because it does, in fact, buttress Ryan's claim that he intended to defraud her. Moreover, although we cannot tell from the appellate record, Debtor may well have offered the appraisal as an exhibit, even before learning of Ryan's new theory, but certain of his exhibits were apparently excluded as a sanction for failures to appear at hearings and to timely and properly respond to discovery requests. Debtor does not appeal those evidentiary

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the court found that Debtor's "failure to disclose he was increasing the loan from $218,914.24 to $256,000, and was receiving $25,743.25 at the closing, leaving no equity in the property, constitutes a false representation for purposes of Ryan's § 523(a)(2)(A) claim."[26] The court also held that the omissions were made with intent to deceive Ryan, stating, "the 'totality of the circumstances' includes the rushed request for the deed, [Debtor's] knowledge that the equity in the home was important to Ryan, [Debtor's] desperate need for the refinance to save the house, and the material omissions regarding the purpose and effect of the refinance."[27]

Although the evidence at trial presents a very close call on Ryan's claim of § 523(a)(2)(A) fraud, this Court reviews the Bankruptcy Court's findings of fact only for clear error. Under the clearly erroneous standard, it is not sufficient to overturn a finding simply because the evidence may support a contrary one. Reversal is only justified when either the findings are unsupported by the record, or if the appellate court has a "definite and firm conviction that a mistake has been made."[28]

In this case, the Bankruptcy Court found that Debtor's failure to tell Ryan that he was taking equity out of the property in connection with the refinance was a material omission that constituted a false representation under § 523(a)(2)(A). An appellate court may not substitute its judgment for a bankruptcy court's determination of the facts, specifically because the trial court is in the best

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[25] (...continued)
rulings.

[26] *Order* at 7, *in* App. at 133.

[27] *Id.*

[28] *Holdeman v. Devine*, 572 F.3d 1190, 1192 (10th Cir. 2009) (internal quotation marks omitted).

position to determine witness credibility.[29]

In order to meet her burden on the issue of fraudulent non-disclosure, Ryan must have established that Debtor "had a duty to disclose material information" and failed to do so.[30] A party to a transaction has a duty to disclose "material facts that in equity or good conscience should be disclosed."[31] Often, that duty is derived from the nature of the parties' relationship, particularly when their relationship is one of "trust and confidence between them."[32] Such a "confidential relationship" may be found where "(1) one party has taken steps to induce another to believe that it can safely rely on the first party's judgment or advice; (2) one party has gained the confidence of the other and purports to act or advise with the other's interest in mind; or (3) the parties' relationship is such that one is induced to relax the care and vigilance that ordinarily would be exercised in dealing with a stranger."[33]

In concluding that Ryan had proven fraudulent non-disclosure, the Bankruptcy Court noted that "Ryan and [Debtor] had known each other for almost ten years, had a child together, and although separated, had an amicable relationship."[34] Furthermore, "Ryan testified she agreed to sign over her interest in the Residence because she wanted to help [Debtor] and had no reason not to

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29 *Holaday v. Seay (In re Seay)*, 215 B.R. 780, 791 (10th Cir. BAP 1997).

30 *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.*, 965 P.2d 105, 111 (Colo. 1998) (en banc).

31 *Id.* (internal quotation marks omitted).

32 *Restatement (Second) of Torts* § 551(2)(a) (1977).

33 *In re Marriage of Page*, 70 P.3d 579, 581 (Colo. App. 2003). *See also Estate of Lopata*, 641 P.2d 952-54 (Colo. 1982) (holding that a confidential relationship may exist between a husband and wife).

34 *Order* at 8, *in* App. at 134.

trust him."[35] These findings are fully supported by the evidence, and this Court concludes that they establish that the parties did have a "confidential relationship" sufficient to impose a duty on Debtor to disclose material facts.

Upon careful review of the record, we conclude that the Bankruptcy Court's findings regarding Debtor's omissions and intent, as well as Ryan's reliance, are not clearly erroneous.

C. Ryan's Damages

Now that we have concluded that the Bankruptcy Court did not err in its findings regarding the first four elements of Ryan's § 523(a)(2)(A) claim, we must review the Court's final decision regarding the last element of Ryan's dischargeability claim. In other words, we must determine whether Ryan's $10,000 damages were, in fact, caused by Debtor's failure to disclose that he was increasing the amount of the mortgage lien against the real property by $40,000, and that he was removing over $25,000 in cash, after the closing, from the new loan.

The Bankruptcy Court found, "[w]ith no equity left in the home and [Debtor's] bankruptcy pending, Ryan's Promissory Note remains unpaid and subject to the bankruptcy discharge certainly causing monetary damage to Ryan."[36] Essentially, the Bankruptcy Court concluded that Ryan had satisfied the damage element of her fraud claim by establishing that her claim had not been paid, that it would never be paid because the real property is no longer available to satisfy her claim as the parties had agreed, and because Debtor filed bankruptcy.

The parties' agreement provided that Ryan's $10,000 interest in the real

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[35] *Id.* at 7, *in* App. at 133. Although the Bankruptcy Court made these findings in its consideration of the issue of justifiable reliance by Ryan, they are equally relevant to the existence of a "confidential relationship."

[36] *Order* at 8, *in* App. at 134.

property would be paid either from the sale of the house or within five years, whichever event occurred first. The Bankruptcy Court believed that Ryan would not have quit claimed her interest in the property had she known the two omitted facts. Impliedly, the Court appears to have held that since everyone agreed there was at least $40,000 equity in the property, that had Debtor disclosed that he was increasing the debt against the property and removing $25,000 cash, Ryan would not have quit claimed her interest and she would not have been deprived of the lost opportunity to capture that equity by having the house immediately sold.

When asked whether he considered selling the house instead of increasing the debt against, and removing cash from, the real estate (since he testified he had no job at the time of the refinance),[37] he simply indicated he had decided not to do so. He thus elected, without disclosing the relevant facts to Ryan that would have enabled her to decline to quit claim, and force a sale, not to capture the $40,000 equity immediately (or $80,000, as he argues on appeal) by selling the house.[38]

Although we agree that the causation link for damages is weak, there is evidence in the record to support the Bankruptcy Court's conclusion that had Debtor disclosed all the facts, which we agree he had a duty to do, Ryan would not have quit claimed her interest, and could have captured her $10,000 equity (out of the $80,000 that Debtor strenuously argues existed).

IV. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's judgment determining

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[37] This begs the question why the lender made the loan. The evidence also showed that Ryan did not know he was unemployed, as she thought he was doing consulting work.

[38] The closing statement in evidence showed that the loan payoff at the time of the refinance was $218,914.24. *Borrower Final Closing Statement, in* App. at 125. If the property was truly worth $300,000, as Debtor argues, and if Debtor and Ryan had instead decided to then sell the house even through a realtor, assuming even 10% closing costs, there would theoretically have been more than enough sales proceeds to pay Ryan's $10,000 interest from the sales proceeds.

Ryan's claim against Debtor to be non-dischargeable pursuant to § 523(a)(2)(A) is AFFIRMED.