

1 WRITTEN DECISION - NOT FOR PUBLICATION

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3 ENTERED SEP 30 2013  
4 FILED  
5 SEP 27 2013  
6 CLERK, U.S. BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 BY Be DEPUTY

9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 10-22356-PB7  
12 ) Adv. No. 11-90154-PB  
13 CURTIS L. and STEPHANIE A. )  
14 FARBER, )  
15 ) ORDER ON DEFENDANT'S  
16 ) RENEWED MOTION FOR  
17 ) PARTIAL SUMMARY  
18 ) JUDGMENT  
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CHRISTOPHER J. and WENDY W. )  
PHILCOX, )  
Plaintiffs, )  
v. )  
CURTIS L. and STEPHANIE A. )  
FARBER, )  
Defendants. )

23 Defendants' previous motion for partial summary judgment was  
24 denied with respect to Plaintiffs' § 523(a)(2)(A) and §  
25 523(a)(2)(B) claims. The § 523(a)(2)(A) is based upon  
26 Plaintiffs' reconveyance of a deed of trust. In this renewed

1 motion, Defendants have added evidence of the value of the  
2 subject property as of the date of the reconveyance. The Court  
3 has decided to afford Plaintiffs an additional opportunity to  
4 obtain their own evidence of value. Accordingly, no ruling is  
5 made on the § 523(a)(2)(A) claim at this time. Rather,  
6 Plaintiffs have 60 days from the entry of this order to obtain  
7 and file competent evidence of value. Once that is filed, the  
8 Court will contact the parties and schedule a hearing on this  
9 part of the motion.

10 The motion is denied with respect to the § 523(a)(2)(B), as  
11 there is neither new evidence nor argument.

#### 12 BACKGROUND

13 As of the beginning of 2006, after a series of transactions,  
14 Plaintiffs held a promissory note in the amount of \$1.5 million  
15 signed by Defendants' wholly owned corporation, Pacific Liberty,  
16 Inc., (PL Note). The PL Note was secured by a second priority  
17 deed of trust on Defendants' real property at Las Flores Drive in  
18 Carlsbad, California (Las Flores Property). The Las Flores  
19 Property was subject to a first priority deed of trust held by  
20 construction lender Temecula Valley Bank (TVB).

21 On September 27, 2006, at the request of Defendant Curtis  
22 Farber, Plaintiffs agreed to reconvey their second priority deed  
23 of trust on the Las Flores Property, to enable Defendants to  
24 negotiate an extension and increase with TVB. Plaintiffs contend  
25 that they agreed to reconvey the deed of trust based upon Curtis'  
26 assurance that the deed of trust would be promptly re-recorded.

1 Indeed, the copy of the Reconveyance provided by Plaintiffs  
2 includes a notation "we've signed the form to put it right back  
3 on." This is the first alleged misrepresentation at issue.

4 For reasons which are not relevant to this decision,  
5 Plaintiffs' deed of trust was not re-recorded. On April 22,  
6 2008, TVB foreclosed on the Las Flores Property. TVB credit bid  
7 the full amount of its senior claim, and Plaintiffs have received  
8 nothing on the PL Note since Defendants stopped making payments  
9 in May, 2008.

10 After Defendants stopped making payments on the PL Note, the  
11 parties began negotiating a resolution. In connection therewith,  
12 Defendants prepared a financial statement and schedule of real  
13 estate assets. On August 7, 2008, former counsel for the  
14 Defendants forwarded the Financial Statement attached to an  
15 email, in which he explained "Excluded from the Statement are  
16 assets held in qualified retirement plans (401k) and IRAs."

17 Defendants hired new counsel, and continued negotiations.  
18 Plaintiffs requested a verified, updated personal financial  
19 statement for Defendants. On November 11, 2008, Defendants' new  
20 counsel sent an updated version of the Financial Statement, which  
21 was, according to Defendants, "essentially identical to the one  
22 sent by [former counsel] in August 2008." This version of the  
23 Financial Statement is the second alleged misrepresentation at  
24 issue.

25 On November 15, 2008, the parties executed a "Settlement and  
26 Security Agreement and Release" (Settlement Agreement). Per the

1 Settlement Agreement, Plaintiffs and Defendants agreed to  
2 extinguish the Note (and another not subject to this motion) and  
3 replace them with a new note in the amount of \$2 million (New  
4 Note). The Settlement Agreement provided that the New Note would  
5 constitute a novation of the previous notes. The parties also  
6 executed mutual releases and waiver of Civil Code § 1542, which  
7 contained a "carve out" should Defendants file a bankruptcy  
8 petition.

9 Plaintiffs claim to have relied on false financial  
10 statements which omitted over \$1,000,000 in liquid assets.  
11 Plaintiffs claim they would not have entered into the Settlement  
12 Agreement if they had known of those assets. Plaintiffs  
13 acknowledge that the cover sheet to the financial statement  
14 prepared by counsel for Defendants stated that the 401K plan and  
15 IRA were not included, but also claim that the same attorney  
16 stated that Defendants had nothing to live on.

17 Plaintiffs filed a complaint seeking to have their claims  
18 excepted from Defendants' discharge on several theories. Two of  
19 the theories are challenged in this motion for summary judgment -  
20 sections 523(a)(2)(A) and (B).

#### 21 DISCUSSION

22 Defendants have renewed their motion for summary judgment on  
23 two of Plaintiffs' claims - sections 523(a)(2)(A) and (B). Those  
24 claims are based upon two separate alleged misrepresentations.

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1 Section 523(a)(2)(A)

2 As discussed above, Plaintiffs contend that Defendant Curtis  
3 induced them to reconvey their deed of trust on the Las Flores  
4 Property by misrepresenting his intent to immediately re-record  
5 the deed of trust. Section 523(a)(2)(A) excepts from discharge  
6 "any debt" "(2) for money, property, services, or an extension,  
7 renewal, or refinancing of credit, to the extent obtained by--  
8 (A) false pretenses, a false representation, or actual fraud,  
9 other than a statement respecting the debtor's or an insider's  
10 financial condition."

11 Claims under § 523(a)(2)(A) typically stand or fall on  
12 whether the representation was false, whether it was material  
13 and/or whether the debtor justifiably relied thereon. However,  
14 before getting to those issues, the Court must determine whether  
15 there is a "debt" and whether debtor "obtained" any "money,  
16 property, services, or an extension, renewal, or refinancing of  
17 credit," in the first place.

18 In this case what Defendants "obtained" was a reconveyance  
19 of Plaintiffs' deed of trust. The reconveyed deed of trust is  
20 clearly not money, services, nor an extension, renewal or  
21 refinancing of credit. The only other option is that it is  
22 property. Property is not defined in § 523 or anywhere else in  
23 the Code. In a Supreme Court case applying the predecessor to §  
24 523 under the Act, the court concluded that legal services were

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1 not property, describing the limitations of the concept of  
2 property:

3 At most [property] denotes something subject to  
4 ownership, transfer, or exclusive possession and  
5 enjoyment, which may be brought within the dominion and  
6 control of a court through some recognized process.  
7 This is certainly the full extent of the word's meaning  
8 as employed in ordinary speech and business, and the  
9 same significance attaches to it in many carefully  
10 prepared writings.

11 Gleason v. Thaw, 236 U.S. 558, 561 (1915).

12 The Court finds that in general, the reconveyance of a deed  
13 of trust would fit within this parameter and would amount to  
14 obtaining property. It is generally accepted that granting a  
15 security interest in property is a transfer of property. It  
16 stands to reason then that return of such an interest is a  
17 transfer of property.

18 The issue raised by Defendants' renewed motion is whether  
19 the security interest reconveyed had any value. If it did not,  
20 Defendants' theory is that no "debt" would have resulted based  
21 upon the reconveyance. Another way to state the same argument,  
22 is that the alleged fraud and reconveyance would have resulted in  
23 no damages. See In re Siriani, 967 F.2d 302, 304 (9<sup>th</sup> Cir.  
24 1992), in which the court set out the elements of § 523(a)(2)(A),  
25 which included "(7) that damage proximately resulted from the  
26 misrepresentation."

In support of the prior motion Defendants had submitted the  
declaration of appraiser Kenneth Keagy, in which he opined on the  
value of the Las Flores Property as of April 22, 2008, the date

1 TVB foreclosed. In support of the renewed motion Defendants have  
2 submitted the Supplemental Appraisal Report of appraiser Keagy,  
3 in which he opines that as of September 27, 2006, the date the  
4 Las Flores deed of trust was reconveyed, the Las Flores Property  
5 was worth \$4,500,00, which is less than what was owed to TVB at  
6 that time - \$5,549,613.80 as of September 19, 2006.

7 Based upon these numbers, the reconveyed deed of trust had  
8 no value, and thus no debt arose based thereon. Plaintiffs have  
9 provided no competent evidence to date to the contrary.

10 At the hearing, Plaintiffs requested a continuance in order  
11 to obtain a competing appraisal, showing that the reconveyed deed  
12 of trust had some value. The Court has misgivings, because, as  
13 counsel for the Defendants explained at the hearing, Plaintiffs  
14 had notice of the hearing and an opportunity to obtain a  
15 competing appraisal. Nevertheless, upon reflection the Court has  
16 decided to allow the Plaintiffs such an opportunity.  
17 Accordingly, the Court will not rule on Plaintiffs' motion at  
18 this time. Rather, Plaintiffs have 60 days from the entry of  
19 this order to obtain and file competent evidence of value. Once  
20 that is filed, the Court will contact the parties to reschedule  
21 the hearing on this motion.

22 **Section 523(a)(2)(B)**

23 Defendants also seek summary judgment on the § 523(a)(2)(B)  
24 cause of action, arguing that the "alleged omissions in the  
25 financial statements delivered to Plaintiffs were neither false  
26 nor material." This argument was raised and rejected in

1 Defendants' prior motion for summary judgment. Defendants added  
2 neither new argument nor evidence. As with the prior motion, the  
3 motion is denied as there are triable issues of material fact on  
4 this claim.

5 **CONCLUSION**

6 For the foregoing reasons, the Court will not rule on  
7 Defendants' motion on the § 523(a)(2)(A) claim at this time.  
8 Rather, Plaintiffs have 60 days from the entry of this order to  
9 obtain and file competent evidence of value. Once that is filed,  
10 the Court will contact the parties to reschedule the hearing on  
11 this motion. The Court denies the motion with respect to the §  
12 523(a)(2)(B) claim.

13 IT IS SO ORDERED.

14 DATED: SEP 27 2013

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17 PETER W. BOWIE, Judge  
18 United States Bankruptcy Court  
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