

SEP 28 2006

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

ORDERED PUBLISHED

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

6	In re:)	BAP No.	SC-05-1314-SRyMa
7	PETER MUNTON,)	Bk. No.	03-05103
8	Debtor.)	Adv. No.	03-90314
9	_____)		
10	T & D MORAVITS & CO.,)		
11	Appellant,)		
12	v.)	O P I N I O N	
13	PETER MUNTON,)		
14	Appellee.)		
	_____)		

Argued and Submitted by Telephone Conference
on July 14, 2006

Filed - September 28, 2006

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

Honorable Peter W. Bowie, Chief Bankruptcy Judge, Presiding

Before: SMITH, RYAN¹, and MARLAR, Bankruptcy Judges.

¹ Hon. John E. Ryan, United States Bankruptcy Judge for the
Central District of California, sitting by designation.

1 SMITH, Bankruptcy Judge:
2

3 An unpaid subcontractor sought to except from discharge debt
4 incurred by debtor through the alleged breach of fiduciary duty
5 arising from the misapplication of statutory trust funds. The
6 bankruptcy court denied its motion for summary judgment and this
7 appeal followed.² We REVERSE and REMAND.

8 **I. FACTS**

9 T & D Moravits & Co. ("Moravits"), a concrete subcontractor,
10 provided materials and services to Ryan Companies US, Inc. dba
11 Ryan Midwest Construction Co. for the construction of townhouses
12 owned by CPWH Resident, Ltd. ("CPWH"), a Texas limited
13 partnership. The principals of CPWH are Richard P. Richmond
14 ("Richmond") and Peter Muntou ("Muntou" or "Debtor"). Washington
15 Mutual Bank, F.A. ("Bank") financed the project and disbursed the
16 loan proceeds directly to CPWH based upon invoices presented by
17 the subcontractors. CPWH, however, failed to pay over these
18 funds to certain subcontractors.

19 In March 2002, subcontractor Concept General Contracting,
20 Inc. filed a suit in Texas state court against CPWH and Richmond
21 for nonpayment. Moravits filed a petition in intervention
22 against Muntou alleging, among other claims, that he violated the
23 Texas Construction Trust Fund Statute³ (the "state court action").
24

25 ² The BAP granted leave to appeal this interlocutory order
26 on November 29, 2005.

27 ³ The Texas Construction Trust Fund Statute (sometimes
28 referred to herein as the "Texas statute") is set forth under
Chapter 162 of the Texas Property Code.

(continued...)

1
2 ³(...continued)
3 Section 162.001(a) provides

4 (a) Construction payments are trust funds
5 under this chapter if the payments are made
6 to a contractor or subcontractor or to an
7 officer, director, or agent of a contractor
8 or subcontractor, under a construction
9 contract for the improvement of specific real
10 property in this state.

11 Section 162.002 states

12 A contractor, subcontractor, or owner or an
13 officer, director, or agent of a contractor,
14 subcontractor, or owner, who receives trust
15 funds or who has control or direction of
16 trust funds, is a trustee of the trust funds.

17 Pursuant to § 162.031, the Texas statute is triggered by

18 (a) A trustee who, intentionally or knowingly
19 or with intent to defraud, directly or
20 indirectly retains, uses, disburses, or
21 otherwise diverts trust funds without first
22 fully paying all current or past due
23 obligations incurred by the trustee to the
24 beneficiaries of the trust funds, has
25 misapplied the trust funds.

26 The following provisions also provide for a "safe harbor"
27 for certain uses of these trust funds (affirmative defenses):

28 (b) It is an affirmative defense to
 prosecution or other action brought under
 [s]ubsection (a) that the trust funds not
 paid to the beneficiaries of the trust were
 used by the trustee to pay the trustee's
 actual expenses directly related to the
 construction or repair of the improvement or
 have been retained by the trustee, after
 notice to the beneficiary who has made a
 request for payment, as a result of the
 trustee's reasonable belief that
 the beneficiary is not entitled to such funds
 or have been retained as authorized or
 required by Chapter 53.

(continued...)

1 Munton did not respond to the state court action and, as a
2 result, in May 2002, a default judgment was entered in the amount
3 of \$168,813.31 (the "default judgment"). The default judgment
4 provided that Munton "violated the Texas statute and breached
5 fiduciary duties."

6 In May 2003, Munton filed a chapter 7 petition. Thereafter,
7 Moravits timely commenced a complaint for nondischargeability
8 pursuant to § 523(a)(4)⁴. Debtor answered with a general denial
9 and pled various affirmative defenses.

10 Moravits filed a motion for summary judgment ("MSJ"),
11 requesting that the bankruptcy court give collateral estoppel
12 effect to the default judgment and determine the debt
13 nondischargeable.

14 Relying heavily on the Fifth Circuit's decision in Coburn
15 Co. of Beaumont v. Nicholas (In re Nicholas), 956 F.2d 110 (5th
16 Cir. 1992), Debtor responded that under the Texas statute, an
17 express trust (within the meaning of § 523(a)(4)) is only
18 established upon specific findings that a contractor misapplied
19

20
21 ³(...continued)

22 (c) It is also an affirmative defense to
23 prosecution or other action brought under
24 Subsection (a) that the trustee paid the
25 beneficiaries all trust funds which they are
entitled to receive no later than 30 days
following written notice to the trustee of
the filing of a criminal complaint or other
notice of a pending criminal investigation.

26 ⁴ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

1 funds covered under the statute. Because no such findings were
2 made, there was no per se violation of the Texas statute, hence,
3 the elements of § 523(a) (4) were not satisfied by the default
4 judgment alone.

5 Moravits disputed the application of Nicholas, arguing that
6 in Nicholas, unlike in the instant case, there were no prior
7 state court findings that the debtor had violated the Texas
8 statute. Moravits further argued that Ninth Circuit law, and not
9 that of the Fifth Circuit, applied. In Nicholas, the Fifth
10 Circuit imposed upon the plaintiff the burden of disproving the
11 existence of affirmative defenses. Id. at 114. Specifically,
12 the court found that because the plaintiff had failed to
13 establish, in Texas, the absence of affirmative defenses under
14 the Texas statute, no trust relationship existed for purposes of
15 § 523(a) (4). Id. By contrast, in Otto v. Niles (In re Niles),
16 106 F.3d 1456 (9th Cir. 1997), the Ninth Circuit held that the
17 burden of establishing affirmative defenses remains with the
18 defendant debtor.

19 The bankruptcy court agreed with Moravits that the default
20 judgment conclusively determined that Debtor had violated the
21 Texas statute by not paying over the funds he received from the
22 Bank to Moravits for that purpose. In addition, the court found
23 that the affirmative defense was not an element of a cause of
24 action brought pursuant to the Texas statute. However, in
25 choosing to adopt the reasoning in Nicholas, the court held that
26 for there to be a § 523(a) (4) violation, Moravits would need to
27 establish not only a breach of the construction trust fund
28 provision of the Texas statute, but also a breach of § 523(a) (4).

1 In order to establish a breach of § 523(a)(4), the court
2 indicated that Moravits would have to produce evidence which
3 proved that Debtor was in a fiduciary relationship within the
4 meaning of § 523(a)(4), which he breached by knowingly or
5 purposely misapplying the loan proceeds under the Texas statute.

6 Based on its decision, the bankruptcy court granted summary
7 adjudication in Moravits' favor as to there being a breach of the
8 Texas statute by Debtor. However, because the court believed
9 that a material issue still remained as to whether Debtor had the
10 specific knowledge or intent to misapply the loan proceeds, it
11 offered Moravits the opportunity to either advance the matter to
12 trial on the issue of the misapplication of trust funds or to
13 appeal the denial of summary judgment.

14 Moravits filed a notice of appeal from the denial order, and
15 the BAP granted leave to appeal.

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
18 and §§ 157(b)(1) and (b)(2)(I). We have jurisdiction under 28
19 U.S.C. §§ 158(b)(1) and (c)(1).

20 **III. ISSUE**

21 Whether a default judgment, finding a violation of the Texas
22 Construction Trust Fund Statute, is entitled to collateral
23 estoppel effect in a § 523(a)(4) nondischargeability action.

24 **IV. STANDARD OF REVIEW**

25 We review a decision concerning a motion for summary
26 judgment de novo. Consol. Marketing, Inc. v. Marvin Props., Inc.
27 (In re Marvin Props., Inc.), 854 F.2d 1183, 1185 (9th Cir. 1988);
28 Woodworking Enters., Inc. v. Baird (In re Baird), 114 B.R. 198,

1 201 (9th Cir. BAP 1990). The task of an appellate court in
2 reviewing a summary judgment matter is the same as a trial court
3 under Fed. R. Civ. P. 56⁵. Hifai v. Shell Oil Co., 704 F.2d
4 1425, 1428 (9th Cir. 1983). In this case, we must determine
5 whether the bankruptcy court correctly found that there was a
6 genuine issue of material fact. Id.; see also Fed. R. Civ. P.
7 56(c).

8 We also review de novo the bankruptcy court's decision on
9 the availability of collateral estoppel. Baldwin v. Kirkpatrick
10 (In re Baldwin), 245 B.R. 131, 134 (9th Cir. BAP 2000).

11 Whether a person is a "fiduciary" for purposes of
12 § 523(a)(4) is a question of law also reviewed de novo. Lovell
13 v. Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir. BAP
14 1999).

15 V. DISCUSSION

16 A. Affirmative Defenses Not Raised in a Prior State Court 17 Action May Not be Asserted in a Subsequent Dischargeability 18 Proceeding

19 The doctrine of collateral estoppel, or issue preclusion,
20 applies in dischargeability proceedings to preclude the re-
21 litigation of state court findings relevant to dischargeability.
22 Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991). We apply the
23 issue preclusion principles of the state from which the judgment
24 originates. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329
25 F.3d 1119, 1123 (9th Cir. 2003).

26 Under Texas law, issue preclusion may be applied where
27 1) the facts sought to be litigated were fully and fairly

28 ⁵ Fed. R. Civ. P. 56(c) is made applicable to the instant proceeding by Fed. R. Bankr. P. 7056.

1 litigated in a prior proceeding; 2) the same facts were essential
2 to the judgment in the prior action; and 3) the parties were
3 adversaries in the prior action. Bonniwell v. Beech Aircraft
4 Corp., 663 S.W.2d 816, 818 (Tex. 1984). The Fifth Circuit,
5 interpreting Texas law on the doctrine, has held that, as to
6 default judgments, the fully and fairly litigated requirement is
7 satisfied only where the state court has conducted an evidentiary
8 hearing prior to the entry of the default judgment. Pancake v.
9 Reliance Ins. Co. (In re Pancake), 106 F.3d 1242, 1244 (5th Cir.
10 1997).

11 Without challenging the efficacy of the Fifth Circuit's
12 interpretation, we note that under Texas law a default judgment
13 represents an admission of the facts properly alleged in the
14 plaintiff's petition. Stoner v. Thompson, 578 S.W.2d 679, 684-85
15 (Tex. 1979). Moreover, a defendant must plead, prove, and secure
16 findings of any affirmative defenses. See Woods v. William M.
17 Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988). When a defendant
18 fails to answer, he provides no evidence to support any
19 affirmative defenses. Love v. State Bar, 982 S.W.2d 939, 943
20 (Tex. App. 1998). Therefore, a defendant who fails to answer
21 waives any affirmative defenses. Id.; see also Stoner, 578
22 S.W.2d at 684-85; Simon v. BancTexas Quorum, N.A., 754 S.W.2d
23 283, 286 (Tex. App. 1988); Lakeside Leasing Corp. v. Kirkwood
24 Atrium Office Park Phase 3, 750 S.W.2d 847, 850 (Tex. App. 1988).
25 We, therefore, conclude that, under Texas state law, Debtor is
26 precluded, from asserting in the dischargeability action, any
27 affirmative defenses that could have, and should have, been
28 raised in connection with the state court action.

1 B. The Texas Construction Trust Fund Statute Creates a
2 Fiduciary Relationship for Purposes of § 523(a)(4)

3 Section 523(a)(4) provides that an individual debtor is not
4 discharged from any debt "for fraud or defalcation while acting
5 in a fiduciary capacity, embezzlement or larceny."

6 "Fiduciary capacity" is defined and governed by federal law,
7 which narrowly restricts the term to fiduciary relationships that
8 arise from express or technical trusts. Lee-Benner v. Gergely
9 (In re Gergely), 110 F.3d 1448, 1450 (9th Cir. 1997) (quoting
10 Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986)); Lewis v.
11 Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). The
12 broad general definition of a fiduciary relationship, i.e., a
13 relationship of confidence, trust or good faith, is not relevant
14 in the dischargeability context. Ragsdale, 780 F.2d at 796.

15 Though the definition of "fiduciary capacity" is guided by
16 federal law, we look to state law to determine whether the
17 requisite trust relationship exists. Id. A debtor will be
18 deemed a fiduciary if state law creates an express or technical
19 trust relationship which imposes trustee status upon the debtor.
20 Id.; see also Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186,
21 1190 (9th Cir. 2001) ("Fiduciary relationships imposed by statute
22 may cause the debtor to be considered a fiduciary under
23 § 523(a)(4)."). Generally, a trust exists where the statute
24 defines the res, sets forth the fiduciary duties, and imposes a
25 trust prior to, and without reference to, the wrong for which the
26 debt arose. In re Hemmeter, 242 F.3d at 1190. This general

1 principle applies to state construction trust fund statutes.⁶

2 See In re Faulkner, 213 B.R. at 665.

3 In Baird, a case involving Arizona law, we surveyed the
4 murky landscape of published decisions grappling with the
5 application of state-created contractor trusts to the federal
6 standard of "fiduciary" within the context of § 523(a)(4):

7 At one end of the spectrum, courts hold that
8 statutes which only impose criminal or other
9 penalties for the failure of a contractor to
10 make a certain disposition of construction
11 funds do not create fiduciary capacity for
12 dischargeability purposes. These courts
13 reason that any trust relationship that is
14 created by such statutes does not arise prior
15 to and independently of the wrong. At the
16 other end of the spectrum, courts hold that
17 statutes which expressly designate the funds
18 received by the contractor as trust funds and
19 which explicitly impose specific and detailed
20 duties on the contractor regarding the funds
21 create a fiduciary relationship for
22 dischargeability purposes.

23 Between the two ends of the spectrum are
24 cases, such as this one, dealing with statutes
25 which refer to the funds as trust funds, but
26 which do not explicitly impose specific and
27 detailed duties upon the contractor with
28 respect to those funds The Ninth
Circuit has indicated that such statutes create

29
30 ⁶ Construction fund statutes, common in many states,
purport

31 to raise a "trust" in favor of subcontractors
32 or suppliers against contractors who have
33 received payment on a given job ahead of
34 them. The trust is discharged when the
35 contractor applies the monies it receives
36 towards the payment of these subcontractors
37 or suppliers. Such statutes, while couched
38 in trust language, may, but do not
necessarily, create the requisite fiduciary
relationship for purposes of section
523(a)(4) analysis.

39 Airtron, Inc. v. Faulkner (In re Faulkner), 213 B.R. 660, 665
(Bankr. W.D. Tex. 1997).

1 true fiduciary relationships for dischargeability
2 purposes.

3 114 B.R. at 202-03 (citations omitted).

4 In our analysis of cases involving trust fund statutes with
5 no specific trustee duties, we closely reviewed two important
6 decisions from the Fifth Circuit in light of the BAP's decision
7 in Baird. In Carey Lumber Co. v. Bell, 615 F.2d 370 (5th Cir.
8 1980), we observed that while the applicable Oklahoma statute did
9 not impose specific trustee duties, the Fifth Circuit
10 nevertheless found that it "expressly prohibits the diversion or
11 use of [trust] funds for any purpose other than to satisfy the
12 claims of [beneficiaries]," thereby creating a fiduciary
13 relationship for purposes of dischargeability. In re Baird, 114
14 B.R. at 203-04. We distinguished Carey Lumber from the Fifth
15 Circuit's subsequent decision in Boyle v. Abilene Lumber, Inc.
16 (In re Boyle), 819 F.2d 583 (5th Cir. 1987), a case involving an
17 earlier version of the Texas statute in which the court
18 determined that the requisite trust relationship did not exist,
19 explaining that the statute only prohibited the fraudulent
20 misapplication of trust funds. In re Baird, 114 B.R. at 203-04.
21 As such, to the extent that Boyle was indistinguishable from
22 Carey Lumber and supported a contrary result, we were unpersuaded
23 by the Boyle analysis. Id.

24 Subsequent to our decision in Baird, the Texas statute was
25 expanded to include both the "intentional" and "knowing"
26 diversion of trust funds.⁷ The Fifth Circuit re-examined the

27
28 ⁷ The Texas statute was amended in 1987 to broaden the
scienter requirements to include "intentional" and "knowing"
diversion of funds, and to create affirmative defenses. TEX PROP.
CODE ANN. § 162.031(a); In re Nicholas, 956 F.2d at 112.

1 statute under Nicholas and determined that Boyle remained good
2 law. In re Nicholas, 956 F.2d at 113. It opined that although
3 the amended statute was significantly broadened, it still did not
4 rise to the level of Carey Lumber or Baird. Id. According to
5 Nicholas, the Texas statute, unlike Carey Lumber (Oklahoma law)
6 and Baird (Arizona law), failed to create an express trust
7 because it did not require the segregation of funds. Id. The
8 statute, instead, excused the general misapplication of trust
9 funds if it was found that they were used to pay "actual expenses
10 directly related to the construction or repair of [an]
11 improvement." TEX PROP. CODE ANN. § 162.031(b). The Fifth Circuit,
12 in interpreting the Texas statute in the context of
13 dischargeability, effectively shifted the burden of proof onto the
14 plaintiff to not only prove that funds were paid to the defendant
15 for the benefit of plaintiff - but that the funds were
16 misapplied. Id. It concluded that the Texas statute created a
17 limited trust for purposes of § 523(a)(4) that only arose where
18 the funds were found to be misapplied (retained, used, or
19 diverted to any use other than "actual expenses directly related
20 to the construction or repair of [an] improvement").⁸ Id. at

21
22 ⁸ We note that the Fifth Circuit's rationale contravenes
23 well established bankruptcy case law that the trust cannot be
24 created as a result of the debt. See Davis v. Aetna Acceptance
Co., 293 U.S. 328, 333 (1934); In re Lewis, 97 F.3d at 1185.

25 In Faulkner, a bankruptcy case from the Western District of
26 Texas, the court grudgingly followed Nicholas, but pointed out
27 that

28 One may quibble with the Fifth Circuit's
analysis on this point, as it seems to raise
the trust only in the event the debtor acts
in a fashion prohibited by the statute,
seemingly permitting an action to be brought
on what amounts to a trust ex maleficio.

(continued...)

1 113. We decline to follow the Fifth Circuit.

2 In Baird, we found that the Arizona statute created
3 fiduciary duties for purposes of dischargeability even though the
4 statute itself, like in Carey Lumber (Oklahoma law), did not
5 expressly oblige the contractor to maintain the separate identity
6 of any of the funds, nor did the law require segregation or
7 separate bookkeeping obligations. 114 B.R. at 203.

8 Nevertheless, we found that because the Arizona statute
9 prohibited diversion or use of trust funds for any other purpose
10 other than to satisfy the claims of beneficiaries, a trust was
11 created for purposes of § 523(a)(4). Id. at 203-204.

12 In examining the current version of the Texas statute post-
13 Boyle, we find that the amended statute has been sufficiently
14 enlarged to create fiduciary duties for purposes of
15 dischargeability. As noted above, in Baird, we observed that the
16 earlier statute was limited to the fraudulent misapplication of
17 funds. See In re Baird, 114 B.R. at 203 ("The Texas statute at
18 issue in Boyle prohibits only the fraudulent misapplication of
19 trust funds. In other relevant respects, the Texas statute is
20 similar to . . . Carey Lumber Co."). We believe, however, that
21 as the scienter requirements have been broadened, the Texas
22 statute is now substantively indistinguishable from the Oklahoma

23
24 ⁸(...continued)

25 Nonetheless, this court is constrained to
26 follow what it views to be binding precedent.
27 The Fifth Circuit has, in effect, carved out
28 a special exception from its general rule
regarding trusts ex maleficio (which are
generally not actionable under section
523(a)(4)) for trusts "raised" by the conduct
of contractors in misapplying funds subject
to Texas' construction trust fund statute.

213 B.R. at 665 n.9.

1 and Arizona statutes, and therefore, is now in line with Carey
2 Lumber and Baird. Thus, the Texas statute sufficiently satisfies
3 the "fiduciary capacity" requirements for purposes of
4 § 523(a)(4).

5 The Texas statute, as amended, exhibits the characteristics
6 of a traditional trust relationship as established by the Ninth
7 Circuit. A trust exists where the statute: (1) defines the res;
8 (2) sets forth the fiduciary duties; and (3) imposes a trust
9 prior to the wrong for which the debt arose. See In re Hammeter,
10 242 F.3d at 1190; see also Runnion v. Pedrazzini (In re
11 Pedrazzini), 644 F.2d 756, 759 n.2 (9th Cir. 1981). The Texas
12 statute clearly defines the trust res, i.e. construction payments
13 made to a contractor "under a construction contract for the
14 improvement of specific real property in [Texas]." TEX. PROP. CODE
15 ANN. § 162.001(a). The Texas statute imposes fiduciary duties by
16 prohibiting the intentional use or retention of the trust funds
17 without first paying all obligations owed to the beneficiaries.
18 Id. § 162.031(a). Contrary to the holding in Nicholas, proof
19 that the trustee used trust funds, that were not paid to the
20 beneficiaries, to pay related expenses is relevant only to
21 determine if the trustee breached his fiduciary duty, and not
22 whether the Texas statute creates a trust. Id. §§ 162.031(a) &
23 (b). Finally, the Texas statute imposes the trust upon receipt
24 of the trust funds, prior to any wrongful conduct by the trustee.
25 Id. § 162.002.

26 In addition, in the Ninth Circuit, under Niles, 106 F.3d at
27 1462, it has been established that the creditor bears the burden
28 of proving that the debtor was a fiduciary to whom funds had been

1 entrusted. The burden then shifts to debtor "to account fully
2 for all funds received . . . for [creditor's] benefit, by
3 persuading the trier of fact that she complied with her fiduciary
4 duties" Id.

5 Here, Moravits satisfied its burden of proof by establishing
6 that Debtor was a fiduciary to whom funds had been entrusted
7 under the Texas statute. The bankruptcy court erred when it
8 applied Nicholas and determined that it was Moravits' burden to
9 disprove Debtor's affirmative defenses, i.e., that the loan
10 proceeds were not used to pay expenses allowed under Tex. Prop.
11 Code § 162.031(b), as it is contrary to Ninth Circuit law.

12 C. The Record Supports a Finding of Defalcation for Purposes of
13 § 523(a)(4)

14 A defalcation is a "failure of a party to account for money
15 or property that has been entrusted to them." In re Baird, 114
16 B.R. at 204. For purposes of § 523(a)(4), defalcation includes
17 "innocent, as well as the intentional or negligent defaults so as
18 to reach the conduct of all fiduciaries who were short in their
19 accounts." Id.

20 The bankruptcy court found that Debtor failed to account for
21 loan proceeds received and not paid to Moravits:

22 THE COURT: I'm satisfied as of this point in
23 time of the following: that is, the Texas
24 court made a determination expressly that it
25 had both subject matter and in personam
26 jurisdiction over the parties, including
27 [Debtor]; secondly, it found and granted the
28 judgment for breach of the construction trust
fund provisions of the Texas law, chapter
162, reflecting that funds were paid to the
general contractor CPWH; that the funds were
not paid to the plaintiff, Moravits. And
that's what appears to be the elements of a
cause of action under the construction trust
fund provision.

