NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1357-DKiPa
LEONARD G. GORDON,	Bk. No. LA 09-29930 SB
Debtor.	Adv. No. LA 09-02495 SB
MATTHEW ZUCKERMAN,	
Appellant,	
v.	
LEONARD G. GORDON,	**M E M O R A N D U M**[1]
Appellee.	

Argued and Submitted on March 16, 2011
at Pasadena, California

Filed - April 6, 2011

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

Hon. Samuel L. Bufford, Bankruptcy Judge, Presiding.

Appearances: Sue-Ann Tran of Fraley & Associates for Appellant.
Arnold M. Johnson for the Appellee.

Before: DUNN, KIRSCHER, and PAPPAS Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

The bankruptcy court determined that a finding by a Colorado trial court that debtor had not breached a fiduciary duty to Appellant when he failed to account to Appellant for proceeds of a loan precluded Appellant from obtaining a nondischargeability judgment against the Appellee under § 523(a)(4)[2] based on the debtor's alleged defalcation while acting in a fiduciary capacity. We AFFIRM.

I. FACTS

In 2001, Matthew Zuckerman asked his friend, Leonard G. Gordon, with whom Mr. Zuckerman also had done business over a period of more than ten years, to help him get out of a financial crisis. Mr. Gordon agreed, and the parties entered into three agreements ("Agreements"), the collective objective of which was to access for Mr. Zuckerman's benefit equity in real property in Woody Creek, Colorado ("Colorado Property"), in which Mr. Zuckerman and his family had lived for years.

The Colorado Property was owned by HyperPanel University, Inc. ("HyperPanel"), a Nevada corporation wholly owned by Mr. Zuckerman. At the time the Agreements were executed, the Colorado Property had an appraised value of between $1,650,000 and $1,710,000. The Colorado Property was encumbered by a first position deed of trust in favor of Intermountain Marketing and Finance, Inc.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

("Intermountain") in the amount of $950,000. Intermountain also was a Nevada corporation wholly owned by Mr. Zuckerman.

The documents which comprised the Agreements included an Assumption of Controls Agreement dated September 30, 2001, an Agreement dated October 10, 2001 ("October 2001 Agreement"), and a Power of Attorney and Indemnification ("POA") dated October 10, 2001.

The parties to the Assumption of Controls Agreement were Mr. Zuckerman and Commercial Scientific Corporation ("ComSci"), which appears to be a company in which Mr. Gordon had an unspecified interest. The Assumption of Controls Agreement defines ComSci as the "Contractor," and states that it

> concerns certain fiduciary, professional services, and surrogacy required of ComSci's Leonard G. Gordon . . . in furtherance of the existing and continuing active and hands-on development of, and the tactical operation of a series [sic] projects and business opportunities that may, from time to time, involve the capital assets of and the professional man-hours of [Mr. Zuckerman].

Mr. Zuckerman and his affiliates are collectively referred to as the "Client." Mr. Gordon signed the Assumption of Controls Agreement on behalf of ComSci.

The Assumption of Controls Agreement was drafted by the parties without the assistance of counsel. Mr. Zuckerman's purpose in entering the Assumption of Controls Agreement is set forth in paragraph II.1., which provides:

> [The Client] owns, controls, operates and provides services to certain real properties, cash receivables, securities and other valuable and potentially valuable tangible and intangible assets (collectively hereinafter referred to as the "Assets"), all of which are in need of

> new and more cohesive resident long-term executive management and of fiduciary an [sic] investment advisory services. The Client is also desirous of seeing the subject Assets to be, in-part [sic], proactively deployed in technology-driven financial markets hedge fund type trading as a way to realize higher yielding returns. One of these opportunities uses highly reputed market-timing technologies that share the objectives of short-term higher risk oriented "day trader" trading. This system of technologies and its in-market uses requires specialized knowledge, and related techniques and know-how that Gordon is uniquely and specifically qualified to provide.

The amorphous arrangement between the parties is identified in paragraph III of the Assumption of Controls Agreement, which is entitled "Specific Work Programs." This paragraph provides that Mr. Gordon had chosen, subject to the continuing mandate of Mr. Zuckerman, as his first work program "to act immediately to arrange the refinancing of certain real estate owned by an affiliated corporation." Paragraph IV.2. required Mr. Gordon to "proactively take direct possession of the proceeds of the real estate's refinancing in order to satisfy a number of overdue financial obligations that presently offer a severe threat to the financial stability of the Assets." The Assumption of Controls Agreement contemplates that Mr. Gordon would need to contribute his own direct capital contributions in addition to his "specialized expertise and useful and timely assistance." In exchange, he was entitled to determine the "earned consideration" for the services performed, including the amount of a "Contractor-Discretionary success consideration."

The parties to the October 2001 Agreement were Mr. Gordon, personally, and Mr. Zuckerman. The October 2001 Agreement had

greater specificity than the Assumption of Controls Agreement. Under the October 2001 Agreement, Mr. Zuckerman was to transfer or cause to be transferred to Mr. Gordon all rights, title and interest in the Colorado Property. Mr. Gordon was to secure a loan in the amount of $995,000 on the Colorado Property and to pay Intermountain $950,000 from the proceeds ("Refinance Proceeds") for release of its first position deed of trust. Mr. Zuckerman was to occupy the Colorado Property, and was responsible for payment of all taxes, utilities, and maintenance costs with respect to the Colorado Property. Mr. Zuckerman was to use $500,000 of the funds paid to Intermountain to loan (the "Intermountain Loan") to one or more "business units" Mr. Gordon was to form and operate utilizing "quantitative financial trading models." The business units were then to make the payments on the new loan on the Colorado Property until the later of June 15, 2003 or until Mr. Zuckerman converted the Intermountain Loan into a 35% equity interest in the business units, an option available to exercise at Mr. Zuckerman's discretion. If Mr. Zuckerman did not convert the Intermountain Loan into an equity interest in the business units by June 15, 2003, the business units were to repay the Intermountain Loan to Mr. Zuckerman on that date.

In exchange for the Intermountain Loan to the business units, Mr. Gordon agreed to serve as "custodian of title" to the Colorado Property and the Refinance Proceeds at no charge to Mr. Zuckerman. By June 15, 2003, Mr. Gordon was to place the full present value and title to "the aforementioned property" offshore through the use of

deeds of trust and "quick claim deeds" or through any other means necessary.

Finally, the October 2001 Agreement required Mr. Gordon to maintain $357,079[3] in an interest bearing account. From this account, Mr. Gordon was to pay Mr. Zuckerman $12,500 each month for twenty months. Each monthly payment was to be made to Mr. Zuckerman in three installments: 60% on the 1st day of the month, 20% on the 10th, and 20% on the 20th. On June 15, 2003, the remaining $107,078 [sic], together with accrued interest, was to be paid to Mr. Zuckerman.

The recitals in the POA set forth the urgency of Mr. Zuckerman's need for "external assistance" for his current business affairs. Under the POA, Mr. Zuckerman was to "empower" Mr. Gordon to "take quasi-unrestricted,[4] outright, and immediate control over all of [Mr. Zuckerman's] assets and liabilities." Specifically, Mr. Gordon was empowered to take immediate "fiduciary" authority and operating control over the Colorado Property, HyperPanel, and Intermountain. The POA instructed Mr. Gordon to

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[3] The October 2001 Agreement also required Mr. Gordon to pay from the Refinance Proceeds $137,752 in specified payments ("Specified Payments"). Refinance Proceeds of $45,000 were to be left after the Intermountain deed of trust obligation was paid. Assuming that the parties used the $950,000 paid to Intermountain to (1) make the Specified Payments and (2) fund the Intermountain Loan, $312,248 would be left of Intermountain's funds; the addition of the $45,000 remaining Refinance Proceeds equals $357,248. Thus, the October 2001 Agreement appears to provide an approximate full allocation for the disposition of the Refinance Proceeds.

[4] The POA does not define the term "quasi-unrestricted."

refinance the Colorado Property, the purpose of which was to raise cash liquidity sufficient to provide a working capital reserve estimated at $995,000. Thereafter, Mr. Gordon, through ComSci, was to organize and implement a "proactive money management portfolio," which was expected to be high risk "concomitant with pursuing returns of such magnitude." The POA states that Mr. Zuckerman believes the harsh and restrictive measures, i.e., surrendering his control over his assets, were "the only practicable way available to enable the two parties to work jointly to get quick control over the circumstances and then begin to create new income and assets." (Emphasis added.) The POA provided that Mr. Zuckerman agreed to indemnify Mr. Gordon for his actions under the agreements; the POA expressly stated that Mr. Gordon was unwilling to undertake to act on Mr. Zuckerman's behalf without the indemnification agreement.

At some point in 2003, the relationship between the parties came to a contentious end. Mr. Gordon sued Mr. Zuckerman and his wife in the Pitkin County (Colorado) Court for a quiet title decree and possession of the Colorado Property ("FED Action"). The FED Action was removed to the Garfield County (Colorado) District Court ("Colorado Court") and was consolidated with litigation which Intermountain and HyperPanel ("Intermountain Claims") had initiated against Mr. Gordon. The Intermountain Claims ultimately were tried in the Zuckermans' names. Following a five-day trial, the Colorado Court in its decision dated September 14, 2005, made numerous findings with respect to the events that gave rise to the litigation, which are incorporated in the facts which follow.

On November 20, 2001, Mr. Gordon executed a special warranty deed as president[5] of HyperPanel through which he conveyed the Colorado Property to himself. On the same date Mr. Gordon executed a deed of trust to IndyMac Bank ("IndyMac"), securing a debt of $985,000 on the Colorado Property. The Refinance Proceeds in the amount of $961,875 were in the form of a check made payable by IndyMac to Intermountain. Mr. Gordon, accompanied by a business associate, Jane Yang, and by Mr. Zuckerman, deposited the check into an account in Mr. Gordon's name. Mr. Zuckerman, through Intermountain, never loaned $500,000 to the business units contemplated by the October 2001 Agreement. Mr. Zuckerman received from Mr. Gordon living expenses and expenses for the Colorado Property. He also participated in decisions as to which of his creditors Mr. Gordon was to pay. Mr. Gordon never paid the Intermountain debt from the Refinance Proceeds, but he recorded a release of Intermountain's deed of trust which he executed on January 27, 2003.

The Colorado Court found neither Mr. Gordon nor Mr. Zuckerman to be credible.[6] It also determined that because the parties did

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[5] Mr. Gordon never was president of HyperPanel.

[6] "In his depositions, [Mr. Zuckerman] referred to Felicia Ray as a person who signed important documents with HyperPanel, but later admitted Felicia Ray was not a person, but a house cat. During his deposition, Mr. Zuckerman testified that Michael Berg signed corporate documents as Charles Berg, who was in fact a dog. At trial, he tried to muddy the waters by saying that Michael Berg only signed as Charlie Berg." Colorado Court's Findings of Fact, (continued...)

not follow the Agreements in their use of the Refinance Proceeds, they had in effect abandoned the Agreements, except for the scheme to refinance the Colorado Property and pay Mr. Zuckerman and his creditors. Most importantly for our purposes, the Colorado Court found that "Mr. Zuckerman has waived any rights he has to compliance with [the Agreements] concerning the disposition of the [Refinance Proceeds], except for an accounting of how they were spent."

Based on the evidence before it, the Colorado Court determined that Mr. Gordon had only accounted to Mr. Zuckerman for $763,737 of the $985,000 Refinance Proceeds. Judgment was entered against Mr. Gordon and in favor of Mr. Zuckerman for the balance: $221,243. The Colorado Court specifically held that Mr. Gordon's failure to account was "the result of breach of contract, and not, under these circumstances, as a breach of fiduciary duty." The Colorado Court also stated "Mr. Gordon has not committed fraud or breached any fiduciary duty to Mr. Zuckerman," reaching this conclusion based on its finding that Mr. Zuckerman both knew about and participated in banking the Refinance Proceeds.

The Colorado Court declared the Zuckermans to be the owners of

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[6](...continued)
Conclusions of Law, and Judgment ("Colorado Court Findings") at p. 5. Mr. Gordon doesn't fare much better in the Colorado Court's findings, which note (1) the existence of a fraud judgment against Mr. Gordon in Texas, (2) Mr. Gordon's decision to sell in China a food supplement product he had been unable to market in the United States because the FDA had declared the product unsafe and not salable, and (3) Mr. Gordon's numerous misrepresentations in connection with obtaining the IndyMac loan on the Colorado Property.

the Colorado Property vis-a-vis Mr. Gordon, subject to the IndyMac mortgage.

The Colorado Court of Appeals thereafter affirmed the Colorado Court's judgment, except (1) to clarify that as between Mr. Gordon and the Zuckermans, the latter are liable for repayment of the IndyMac loan, and (2) that the damages were to be recalculated because the Refinance Proceeds were $961,875, not $985,000 as determined by the trial court. The judgment amount following remand was recalculated to be $198,138. The Colorado Supreme Court denied Mr. Gordon's Petition for Writ of Certiorari on May 27, 2008. On May 12, 2009, the Superior Court for the State of California, County of Los Angeles entered a sister-state judgment in favor of Mr. Zuckerman and against Mr. Gordon for $210,083 plus interest based on the Colorado judgment.

Mr. Gordon then filed a voluntary chapter 7 petition on July 31, 2009. On October 23, 2009, Mr. Zuckerman filed an adversary proceeding seeking a determination that the debt represented by the sister-state judgment was nondischargeable pursuant to § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. The bankruptcy court granted summary judgment in favor of Mr. Gordon on August 31, 2010, (1) because the Agreements did not establish an express trust, (2) because the Colorado Court had previously determined that Mr. Gordon did not breach any fiduciary duty to Mr. Zuckerman, and (3) because the Colorado Court's finding that both parties were guilty of unclean hands bars Mr. Zuckerman from litigating the § 523(a)(4) claim for

relief.

Mr. Zuckerman appealed.

II. JURISDICTION

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

III. ISSUE

Whether the Colorado Court's finding that Mr. Gordon did not breach a fiduciary duty to Mr. Zuckerman precludes Mr. Zuckerman from asserting that Mr. Gordon committed a defalcation while acting in a fiduciary capacity.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's decision to grant a motion for summary judgment de novo. Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 783 (9th Cir. 2007). De novo means review is independent, with no deference given to the trial court's conclusion. See First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006); Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi), 432 B.R. 812, 818 (9th Cir. BAP 2010). Our de novo review is governed by the same standard used by the bankruptcy court under Fed. R. Civ. P. 56(c). See Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1131 (9th Cir. 2003). Viewing the evidence in the light most favorable to the nonmoving party, we must determine "whether there

are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law." Tobin v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001).

We also review de novo the preclusive effect of a judgment. Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001); Bankruptcy Recovery Network v. Garcia (In re Garcia), 313 B.R. 307, 310 (9th Cir. BAP 2004).

Both the Ninth Circuit and this Panel have stated that because the issue of whether a person is a fiduciary for purposes of § 523(a)(4) is a question of federal law, it is subject to de novo review on appeal. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986); T & D Moravits & Co. v. Munton (In re Munton), 352 B.R. 707, 712 (9th Cir. BAP 2006); Cantrell v. Cal-Micro, Inc. (In re Cantrell), 269 B.R. 413, 418 (9th Cir. BAP 2001); Lovell v. Stanifer (In re Stanifer), 236 B.R. 709, 713 (9th Cir. BAP 1999); Abrams v. Sea Palms Assoc., Ltd. (In re Abrams), 229 B.R. 784 (9th Cir. BAP 1999). While ultimately we agree that de novo review is appropriate, we view the issue of the existence of a fiduciary relationship as a mixed question of fact and law. This is because determination of whether a fiduciary relationship exists requires that we look to whether an express or technical trust was created pursuant to state law. Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). This, in turn, requires an evaluation of the facts. For example, under California law, applicable in this case because the Agreements were executed in California and the parties agreed that California law would apply to enforcement of the

Agreements, "[t]he five elements required to create an express trust are (1) a competent trustor, (2) trust intent, (3) trust property, (4) trust purpose, and (5) a beneficiary." Keitel v. Heubel, 103 Cal. App. 4th 324, 337, 126 Cal. Rptr. 2d 763 (Cal. Ct. App. 2002). Intent is a question of fact. See, e.g., Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466 (9th Cir. 1996) (§ 523(a)(2) - intent to defraud is a factual issue reviewed under the clearly erroneous standard); Seixas v. Booth (In re Seixas), 239 B.R. 398 (9th Cir. BAP 1999) (§ 523(a)(5) - whether parties intended in their agreement that the obligation to pay college education expenses was "in the nature of support" is an issue of fact). "To the extent that questions of fact cannot be separated from questions of law, we review these questions as mixed questions of law and fact applying a de novo standard." Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 135 (9th Cir. BAP 1997) (citing Ratanasen v. Cal. Dep't of Health Servs., 11 F.3d 1467, 1469 (9th Cir.1993)).

V. DISCUSSION

Section 523(a)(4) excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity." Thus, in order to have the debt represented by the Colorado judgment held nondischargeable under § 523(a)(4) Mr. Zuckerman was required to establish (1) that Mr. Gordon was acting in a fiduciary capacity, and (2) that Mr. Gordon committed a "defalcation" in that capacity.

The scope of the term "fiduciary capacity" under § 523(a)(4) is a question of federal law. See Mills v. Gergely (In re Gergely),

110 F.3d 1448, 1450 (9th Cir. 1997). The Ninth Circuit has adopted a narrow definition of "fiduciary" for purposes of § 523(a)(4), requiring that the fiduciary relationship arise from an express or technical trust that was imposed prior to the wrongdoing that caused the debt. Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996).

Preclusion principles apply in discharge exception proceedings pursuant to § 523(a) to preclude relitigation of state court findings relevant to the dischargeability determination. Grogan v. Garner, 498 U.S. 279, 284 n.11 (1991). Further, 28 U.S.C. § 1738 requires us, as a matter of full faith and credit, to apply the relevant state's preclusion principles. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). In this case, we apply the issue preclusion principles of Colorado, the state from which the judgment originated. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003).

Under Colorado law, issue preclusion bars re-litigation of an issue if:

> (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

Rantz v. Kaufman, 109 P.3d 132, 139 (Colo. 2005); Bebo Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78, 84-85 (Colo. 1999). Generally, under Colorado law the application of defensive

preclusion is mandatory. Central Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson, 940 P.2d 1097, 1103 (Colo. App. 1997) (citing Kairys v. Immigration & Naturalization Service, 981 F.2d 937, 940 (7th Cir. 1992)). In the context of defensive nonmutual preclusion, the court in Central Bank Denver held that "when the requirements for [preclusion] have been met, and the plaintiff had a full and fair opportunity to litigate the issue, 'the application of defensive [preclusion] is mandatory.'" Central Bank Denver 940 P.2d at 1103 (quoting Ackerman v. Am. Airlines, Inc., 924 F.Supp. 749, 753 (N.D. Tex. 1995)). Here, the preclusion is asserted defensively, but it is mutual in the sense that both Mr. Zuckerman and Mr. Gordon were the parties to the findings to which Mr. Gordon sought application of the preclusion doctrine. If nonmutual defensive preclusion is mandatory, so must be mutual defensive preclusion.

In the Colorado Court litigation, Mr. Zuckerman alleged that Mr. Gordon's actions constituted a breach of fiduciary duty. Following a five-day trial, during which Mr. Zuckerman had a "full and fair opportunity to litigate" the issue that Mr. Gordon was acting as Mr. Zuckerman's fiduciary, the Colorado Court rejected that allegation:

> In failing to account [for the Refinance Proceeds], Mr. Gordon has not breached a fiduciary duty to Mr. Zuckerman. He has failed to provide the necessary numerical data concerning the funds remaining out of the refinancing to the extent of $221,243. However, there is no credible evidence that Mr. Gordon shut out Mr. Zuckerman from the expenditures made out of the refinance proceeds. Mr. Gordon and Mr. Zuckerman mixed their various corporate ventures with their personal

> moneys, and Mr. Zuckerman knowingly participated in this way of doing business. The Court concludes that Mr. Gordon had a contractual obligation under the [Agreements] to account for the IndyMac loan proceeds, and he has breached that agreement. He owes the unaccounted for funds in the amount of $221,243 to Mr. Zuckerman. This is the result of breach of contract, and not, under these circumstances, as a breach of fiduciary duty.

Colorado Court Findings at p. 9. (Emphasis added.)

Mr. Zuckerman contends that the Colorado Court decided only that Mr. Gordon did not breach a fiduciary duty. Mr. Zuckerman points out that breach of fiduciary duty is just one of several claims for relief available under § 523(a)(4). He asserts that a claim for defalcation, being separate and distinct from a breach of fiduciary duty, remains a viable claim for relief not precluded by the Colorado Court's limited finding that Mr. Gordon did not breach a fiduciary duty when he failed to account to Mr. Zuckerman for the Refinance Proceeds.

Mr. Zuckerman asserts that under Ninth Circuit law, he need prove only three elements to prevail on his claim for relief: (1) that an express trust existed, (2) that the debt arose from a defalcation, and (3) that Mr. Gordon acted as his fiduciary at the time the debt arose. Banks v. Gill Distrib. Ctrs, Inc. (In re Banks), 263 F.3d 862, 870 (2001). Mr. Zuckerman stresses that because the Agreements were expressly intended to grant Mr. Gordon fiduciary authority over all of Mr. Zuckerman's assets for Mr. Zuckerman's benefit, all he needed to prove to prevail on his claim for defalcation is that Mr. Gordon failed to account for the proceeds. Id. ("This court has defined defalcation as the

'misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds.'"); Woodworking Enterprises, Inc. v. Baird (In re Baird), 114 B.R. 198, 204 (9th Cir. BAP 1990) ("A defalcation is a failure of a party to account for money or property that has been entrusted to them."). He concludes that the Colorado Court's finding that Mr. Gordon failed to account for the Refinance Proceeds is sufficient to establish a defalcation.

We do not view the Colorado Court's findings as limited to the extent argued by Mr. Zuckerman. The Colorado Court did not just find that Mr. Gordon did not breach a fiduciary duty to Mr. Zuckerman when he failed to account for the Refinance Proceeds. While it is true that the Colorado Court did not expressly find that no fiduciary relationship existed between the parties, it did so implicitly. "[W]hile it is the better practice to make express findings, they may be implicit in a court's ruling." Valentine v. Mountain States Mut. Cas. Co., ___ P.3d ___, 2011 WL 32473, at *6 (Colo. App., Jan. 6, 2011), quoting Foster v. Phillips, 6 P.3d 791, 796 (Colo. App. 1999).

The Colorado Court found that because the parties did not follow the Agreements in the manner they used the Refinance Proceeds, they had abandoned the Agreements, except for the obligation of Mr. Gordon to refinance the Colorado Property and to pay Mr. Zuckerman and his creditors out of the Refinance Proceeds. Implicit in this finding is a determination that any fiduciary obligation Mr. Zuckerman alleges was created by the Agreements did

not survive that abandonment. This implicit finding is reinforced by the Colorado Court's explicit finding that Mr. Zuckerman had waived any rights under the Agreements except with respect to an accounting of how the Refinance Proceeds were spent. The Colorado Court further found, explicitly, that the right to an accounting arose from contract, and, implicitly, that it did not arise from a fiduciary relationship. Importantly, these findings are based on the Colorado Court's determination that Mr. Zuckerman himself participated in banking the Refinance Proceeds. Accordingly, taken as a whole, we interpret the Colorado Court's findings as a determination that no fiduciary relationship existed between Mr. Gordon and Mr. Zuckerman.

Because the Agreements did not operate to create a fiduciary relationship/express trust, Mr. Gordon could not have been operating in a fiduciary capacity in his relationship with Mr. Zuckerman. Thus, a necessary element in Mr. Zuckerman's § 523(a)(4) claim for relief already was decided against Mr. Zuckerman by the Colorado Court.

The issue of the existence of an express trust and/or whether Mr. Gordon was acting as Mr. Zuckerman's fiduciary is identical to an issue actually litigated and necessarily adjudicated by the Colorado Court. Mr. Zuckerman was a party to the litigation in the Colorado Court. The Colorado Court issued a judgment on the merits. Following an appeal to the Colorado Court of Appeals, the Colorado Court recalculated the judgment amount, and issued an amended judgment, from which no further appeal was taken. Mr. Zuckerman

obtained a sister-state judgment in California based on the amended judgment of the Colorado Court. Mr. Zuckerman had a full and fair opportunity to litigate the issues in the Colorado Court. As a result, no genuine issue of material fact on the issue of Mr. Gordon's fiduciary capacity existed. Mr. Gordon was not Mr. Zuckerman's fiduciary under the Agreements at any time. Accordingly, the bankruptcy court properly granted summary judgment based on issue preclusion.

Because we may affirm the bankruptcy court on any basis supported by the record, we need not reach the further issue Mr. Zuckerman raised on appeal, i.e., that the bankruptcy court erred when it determined that the Colorado Court's finding that Mr. Zuckerman had "unclean hands" precluded Mr. Zuckerman from pursuing the § 523(a)(4) claim (although it certainly militates in favor of our conclusion).

VI. CONCLUSION

The Colorado Court's findings are entitled to preclusive effect, and establish that Mr. Gordon was not acting in a fiduciary capacity at the time the debt was created. Accordingly, the bankruptcy court did not err when it granted summary judgment to Mr. Gordon on Mr. Zuckerman's § 523(a)(4) claim for relief. We AFFIRM.