

DEC 14 2012

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	NC-11-1653-MkHPa
		)		
6	WILEHARDA KILIAN MBUNDA,	)	Bk. No.	10-34095
		)		
7	Debtor.	)	Adv. No.	10-03267
	_____	)		
8		)		
9	THOMAS VAN ZANDT, Executor for	)		
	the Estate of Evaline Jeanne	)		
10	Malis,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>OPINION</b>	
		)		
13	WILEHARDA KILIAN MBUNDA,	)		
		)		
14	Appellee.	)		
	_____	)		

Argued and Submitted on October 18, 2012  
at San Francisco, California

Filed - December 14, 2012

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Appellant Thomas Van Zandt, Esq. argued on his own behalf as executor for the estate of Evaline Jeanne Malis; and Stephen D. Finestone, Esq. argued for Appellee Wileharda Kilian Mbunda.

Before: MARKELL, HOLLOWELL, and PAPPAS, Bankruptcy Judges.

1 MARKELL, Bankruptcy Judge:  
2

3 **INTRODUCTION**

4 Appellant Thomas Van Zandt ("Thomas"), as executor for the  
5 estate of Evaline Jeanne Malis ("Malis"),<sup>1</sup> sued debtor Wileharda  
6 Kilian Mbunda ("Mbunda") seeking to declare that a debt Mbunda  
7 owed to Malis's probate estate was nondischargeable. The  
8 bankruptcy court initially dismissed without leave to amend all  
9 but one of Thomas's claims for relief. At trial, the court  
10 granted Mbunda's motion for a judgment on partial findings at the  
11 close of Thomas's case, and entered judgment in favor of Mbunda.  
12 We AFFIRM.

13 **FACTS**

14 Mbunda filed her chapter 7<sup>2</sup> bankruptcy case in October 2010.  
15 In her schedules, Mbunda listed a debt to Malis in the amount of  
16 \$165,000 ("Debt"). According to Mbunda's schedules, the Debt  
17 arose from business loans made by Malis to Mbunda in September  
18 and November 2005. These loans were made to Mbunda as the sole  
19 proprietor of an art and jewelry store known as the Twiga  
20 Gallery.

21 Thomas filed his nondischargeability complaint against  
22

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23 <sup>1</sup>Because some of the key players in this appeal share the  
24 same surname, we refer to them by their first name for ease of  
reference. No disrespect is intended.

25 <sup>2</sup>Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
28 the Federal Rules of Civil Procedure. All "Evidence Rule"  
references are to the Federal Rules of Evidence.

1 Mbunda in December 2010. Thomas alleged that the Debt was  
2 nondischargeable under § 523(a)(2)(A), (4) and (6). Consistent  
3 with Mbunda's bankruptcy schedules, the complaint referred to the  
4 transactions from which the Debt arose as a \$100,000 loan from  
5 Malis to Mbunda in September 2005 and a second \$100,000 loan from  
6 Malis to Mbunda in November 2005. According to the complaint,  
7 Malis refinanced her home in order to loan the \$200,000 to  
8 Mbunda.

9 In pertinent part, Thomas also alleged that Mbunda made the  
10 following misrepresentations in order to induce Malis to loan  
11 Mbunda the \$200,000:

- 12 1. Mbunda would use the loan proceeds to purchase artistic  
13 materials for the art gallery, "including antique beads  
14 and quantities of gold, ivory and precious and semi-  
15 precious gemstones" (collectively, "Raw Materials").
- 16 2. Malis would have a security interest in the Raw  
17 Materials and in other real and personal property  
18 Mbunda owned.
- 19 3. Malis also would have a security interest in the Twiga  
20 Gallery (collectively with the Raw Materials and the  
21 other real and personal property allegedly promised as  
22 security, the "Collateral").<sup>3</sup>

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24 <sup>3</sup>The complaint repeatedly refers to the Debt as a loan, and  
25 repeatedly refers to the security allegedly promised for the  
26 loan. In two places, however, the complaint refers to the  
27 underlying transaction as something other than a loan secured by  
28 real and personal property security. First, it alleged that  
Mbunda induced Malis "to invest" in the Twiga Gallery. Complaint  
(Dec. 14, 2010) at ¶ 6. Second, it states that Mbunda told Malis  
(continued...)

1 4. Mbunda would execute transaction documentation  
2 memorializing the Debt and Malis's security interest in  
3 the Collateral.

4 5. Mbunda would make monthly payments sufficient to cover  
5 the increased amount of Malis's monthly mortgage  
6 payments resulting from Malis's home refinancing.

7 Mbunda moved to dismiss Thomas's complaint. In response,  
8 the bankruptcy court dismissed without leave to amend Thomas's  
9 § 523(a)(4) claim to the extent it did not deal with larceny, as  
10 well as his § 523(a)(6) claim. The bankruptcy court granted  
11 Thomas leave to amend his § 523(a)(2)(A) claim and that portion  
12 of his § 523(a)(4) claim alleging that the Debt was a debt  
13 arising from larceny.

14 Thomas filed an amended complaint. Mbunda again filed a  
15 motion to dismiss. The bankruptcy court granted Mbunda's motion  
16 in part, dismissing Thomas's remaining § 523(a)(4) claim without  
17 leave to amend. It then set the sole remaining claim under  
18 § 523(a)(2)(A) for trial.<sup>4</sup>

19 \_\_\_\_\_  
20 <sup>3</sup>(...continued)  
21 that the Debt would be "secured by an ownership interest" in the  
22 Twiga Gallery. Complaint (Dec. 14, 2010) at ¶ 8. Thomas  
23 referred to these two allegations when trying to establish that  
24 the loan was really some other form of transaction, such as a  
partnership, in order to state a claim under § 523(a)(4). We  
address this argument later in this opinion.

25 <sup>4</sup>Thomas had originally attempted to state a claim under  
26 § 523(a)(4) for, among other things, embezzlement and larceny.  
27 These were among the claims initially dismissed. Thomas has not  
28 challenged the dismissal of his § 523(a)(4) action alleging these  
acts. As a result, he has waived any argument relating to those  
theories. See *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149  
(continued...)

1 On November 2, 2011, the trial on Thomas's § 523(a)(2)(A)  
2 claim commenced. After Thomas presented his case in chief,  
3 Mbunda moved under Civil Rule 52(c)<sup>5</sup> for a judgment on partial  
4 findings. The bankruptcy court granted that motion and, on  
5 November 10, 2011, entered a final judgment in Mbunda's favor.  
6 Thomas timely filed a notice of appeal on November 15, 2011.<sup>6</sup>

## 7 DISCUSSION

8 During the course of the adversary proceeding, the  
9 bankruptcy court ruled against Thomas on each of his three claims  
10 for relief. We address each claim for relief in turn.

### 11 1. Section 523(a)(2)(A).

12 Section 523(a)(2)(A) excepts from discharge debts incurred  
13 under false pretenses, based on false representations, or based  
14 on actual fraud. In particular, to establish fraud under  
15 § 523(a)(2)(A), the creditor must prove each of the following  
16 five elements by a preponderance of the evidence:

- 17 (1) the debtor made a representation;

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19 <sup>4</sup>(...continued)  
20 n.4 (9th Cir. 2010); Golden v. Chicago Title Ins. Co. (In re  
Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002).

21 <sup>5</sup>Rule 7052 makes Civil Rule 52(c) applicable in adversary  
22 proceedings. Civil Rule 52(c) provides in relevant part:

23 **Judgment on Partial Findings.** If a party has been fully  
24 heard on an issue during a nonjury trial and the court  
25 finds against the party on that issue, the court may  
26 enter judgment against the party on a claim or defense  
that, under the controlling law, can be maintained or  
defeated only with a favorable finding on that issue.

27 <sup>6</sup>The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
28 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
§ 158.

1 (2) the debtor knew the representation was false at the  
2 time he or she made it;

3 (3) the debtor made the representation with the intent  
4 to deceive;

5 (4) the creditor justifiably relied on the  
6 representation; and

7 (5) the creditor sustained damage as a proximate result  
8 of the misrepresentation having been made.

9 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.  
10 2010). When, as here, the bankruptcy court has resolved the  
11 matter under Civil Rule 52(c), we review the “court’s findings  
12 of fact for clear error and its legal conclusions de  
13 novo.” . . . . The same standard applies to the district court’s  
14 involuntary dismissal of a claim under [Civil] Rule 52(c).” Lee  
15 v. W. Coast Life Ins. Co., 688 F.3d 1004, 1009 (9th Cir. 2012)  
16 (quoting Price v. U.S. Navy, 39 F.3d 1011, 1021 (9th Cir. 1994)).  
17 When deciding a motion under Civil Rule 52(c), as incorporated by  
18 Rule 7052, the bankruptcy court is “not required to draw any  
19 inferences in favor of the non-moving party; rather, the district  
20 court may make findings in accordance with its own view of the  
21 evidence.” Id. (quoting Ritchie v. United States, 451 F.3d 1019,  
22 1023 (9th Cir. 2006)). Accordingly, we review Thomas’s  
23 contentions that the bankruptcy court did not correctly find an  
24 absence of essential elements of the fraud claim under the  
25 clearly erroneous standard. See Candland v. Ins. Co. of N. Am.  
26 (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996); Am. Express  
27 Travel Related Servs. Co. v. Vee Vinhnee (In re Vee Vinhnee), 336  
28 B.R. 437, 443 (9th Cir. BAP 2005) (citing Anastas v. Am. Sav.

1 Bank (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996)).

2 Here, in support of its Civil Rule 52(c) ruling, the  
3 bankruptcy court determined that there was no admissible evidence  
4 from which it could find that Thomas had proved the first or  
5 second elements of his § 523(a)(2)(A) claim: that Mbunda had made  
6 any knowingly false representations. In particular, the court  
7 found that Thomas presented no admissible evidence that Mbunda  
8 had made any affirmative misrepresentations regarding: the  
9 provision of security or collateral for the Debt; the execution  
10 of particular documentation for the Debt; or the timing or amount  
11 of monthly payments on the Debt.

12 While the bankruptcy court acknowledged that Mbunda had  
13 testified that she had told Malis of her need to repay certain  
14 debts around the time of the original transaction, the court  
15 found that what Mbunda generally told Malis did not amount to a  
16 representation that the loan proceeds would be used only to pay  
17 those debts. Furthermore, the court also found that what Mbunda  
18 generally told Malis was consistent with Mbunda's actual use of  
19 the proceeds. According to the court, Mbunda's uncontradicted  
20 testimony reflected that she used most of the proceeds to pay her  
21 debts, including those she owed to her landlord and to certain  
22 consignors of goods.

23 The bankruptcy court further found that Mbunda's promise to  
24 repay the Debt was not false when made. It instead found that  
25 Mbunda intended to repay the loan at the time she borrowed the  
26 \$200,000 from Malis. In support of this finding, the court  
27 relied on the exhibits, offered by Thomas and admitted into  
28 evidence, reflecting that Mbunda had made payments on the Debt of

1 at least \$40,000, and perhaps as much as \$50,000. According to  
2 the court, these payments "completely undermined" any notion that  
3 Mbunda did not intend to repay the Debt at the time she incurred  
4 it. This finding was not clearly erroneous, as it is not  
5 illogical, implausible, or without support in the record. United  
6 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc).

7 Perhaps because of the high standard of review, Thomas did  
8 not argue in his opening brief that the bankruptcy court's  
9 findings were clearly erroneous. Instead, he argued that the  
10 bankruptcy court committed reversible error by excluding certain  
11 evidence. Of the evidence the bankruptcy court excluded, the  
12 most significant is Thomas's testimony regarding what Malis  
13 supposedly told him about the Debt before she passed away.

14 This is also a difficult argument for any appellant, as we  
15 review a bankruptcy court's evidentiary rulings for abuse of  
16 discretion, and then only reverse if any error would have been  
17 prejudicial to the appellant. See Johnson v. Neilson (In re  
18 Slatkin), 525 F.3d 805, 811 (9th Cir. 2008) (citing Latman v.  
19 Burdette, 366 F.3d 774, 786 (9th Cir. 2004)). "We afford broad  
20 discretion to a district court's evidentiary rulings. To reverse  
21 such a ruling, we must find that the district court abused its  
22 discretion and that the error was prejudicial. A reviewing court  
23 should find prejudice only if it concludes that, more probably  
24 than not, the lower court's error tainted the verdict." Harper  
25 v. City of Los Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008)  
26 (citations and internal quotation marks omitted); see also S.E.C.  
27 v. Jasper, 678 F.3d 1116, 1122 (9th Cir 2012) (stating that a  
28 trial court's evidentiary rulings should not be disturbed absent



1 a "clear abuse of discretion" and prejudice).

2 Here, the record makes clear the content of Thomas's  
3 proposed testimony. We have the record of Thomas's arguments  
4 made at trial, his offers of proof, and a declaration that he  
5 filed in support of his opposition to Mbunda's motion in limine  
6 to exclude such evidence. These portions of the record reflect  
7 that, according to Thomas, Malis told him in 2009 and 2010 that  
8 Mbunda had made the following representations regarding the Debt:

- 9 1. that "the loan was an investment";
- 10 2. that the loan would be used to purchase "valuable art  
11 items including antique beads, gold and silver, ivory,  
12 and gems . . .";
- 13 3. that the Raw Materials purchased with the loan proceeds  
14 would be used to produce art works that would be sold  
15 at a profit;
- 16 4. that, if Mbunda could not produce or sell such art  
17 works, she would resell the Raw Materials purchased to  
18 repay the loan;
- 19 5. that Mbunda would make monthly payments large enough to  
20 pay off the Debt within five years;
- 21 6. that, as an investor, Malis would receive a percentage  
22 of the profits from the sale of the artworks;
- 23 7. that Mbunda and Malis were partners;
- 24 8. that Mbunda had many valuable things she could sell to  
25 repay the Debt; and
- 26 9. that Mbunda would execute documentation memorializing  
27 all that they had agreed to.

28 See Plaintiff's Decl. (Oct. 31, 2011) at pp. 2-3.

1           The bankruptcy court ruled that Thomas's proposed testimony  
2 was inadmissible hearsay. See Evidence Rules 801, 802. Thomas  
3 first challenges the bankruptcy court's characterization of the  
4 proposed testimony as hearsay: he argues that Malis's out-of-  
5 court statements were not being offered to prove the truth of the  
6 matter asserted. If correct, admission of the statements would  
7 not violate the hearsay rule. Evidence Rule 801(c)(2)  
8 (statements are hearsay only if "a party offers [them] in  
9 evidence to prove the truth of the matter asserted in the  
10 statement."). According to Thomas, he offered the statements to  
11 establish that Malis thought she had security, or alternatively  
12 thought she was in a partnership with Mbunda. Once Malis's  
13 mental state was established, Thomas would then be able to argue  
14 that the court could infer that representations by Mbunda - about  
15 the collateral and the existence of something other than a loan -  
16 had caused Malis's state of mind.

17           Thomas's argument, however, confuses and conflates the  
18 proffered testimony. The excluded testimony contained two levels  
19 of out-of-court statements: (1) what Mbunda told Malis, and (2)  
20 what Malis told Thomas. Had Malis been available to testify at  
21 trial as to what Mbunda had told her, the first level statements  
22 - what Mbunda supposedly told Malis - could have been admitted  
23 either because they would have been the admission of a party  
24 opponent, Evidence Rule 801(d)(2), or they could have been  
25 testimony not about the truth of Mbunda's statements, but about  
26 the terms of the contract between them. 5-801 Weinstein's Federal  
27 Evidence § 801.11[3] (2012) ("the rule against hearsay does not  
28 exclude relevant evidence as to what the contracting parties said

1 or wrote with respect to the making or the terms of an  
2 agreement."); see also United States v. Montana, 199 F.3d 947,  
3 950 (7th Cir. 1999).

4 But Malis was deceased. Thomas was thus blocked at the  
5 second level in attempting to admit what Malis had told him about  
6 what Mbunda had told Malis. As a result, Thomas attempted to  
7 testify regarding what Malis had told him in 2009 and 2010 about  
8 what Mbunda had told Malis about a transaction that occurred back  
9 in 2005.

10 This convoluted argument shows that Thomas was not trying to  
11 establish Malis's mental state. He was attempting to offer  
12 Malis's statements to prove the truth of what Malis allegedly had  
13 told him about her discussions with Mbunda. As such, Thomas's  
14 statements were inadmissible hearsay, Evidence Rule 801, 802,  
15 805, and their exclusion was not an abuse of discretion. In re  
16 Slatkin, 525 F.3d at 811.

17 Anticipating that he would not prevail on his hearsay  
18 characterization argument, Thomas next argues that Malis's  
19 statements were excepted from the rule against hearsay by  
20 Evidence Rule 803(3). That rule excepts from the hearsay rule  
21 "statement[s] of memory or belief to prove the fact remembered or  
22 believed" if those statements relate "to the validity or terms of  
23 the declarant's will." Evidence Rule 803(3). According to  
24 Thomas, Malis initially shared with him some of her memories  
25 regarding the Debt in the midst of a discussion regarding whether  
26 she needed a will.

27 But Thomas's reading of this exception to the hearsay rule  
28 is overbroad. The Advisory Committee Notes accompanying this

1 rule make clear that this exception is limited to statements  
2 concerning "the execution, revocation, identification, or terms  
3 of declarant's will." Evidence Rule 803, Advisory Committee Note  
4 to para. 3 (citing Annotation: Admissibility of testator's  
5 declarations upon issue of genuineness or due execution of  
6 purported will, 62 A.L.R.2d 855 (1958)). Malis's supposed  
7 memories about her discussions with Mbunda regarding the Debt  
8 simply are beyond the scope of this exception. As one treatise  
9 explains:

10 The "exception" for wills cases is created by special  
11 language in the state-of-mind exception creating an  
12 exception to the limit that otherwise applies, and  
13 "backing in" to a new hearsay exception of such breadth  
14 seems out of proportion to the language chosen.  
15 Pre-Rules state cases did not allow such broad use of  
16 the exception, which reinforces the proposition that  
17 the minimal approach taken in the language of the Fed.  
18 R. Evid. 803(3) did not completely change practice by  
19 opening the door broadly to statements proving behavior  
20 by others.

21 Christopher B. Mueller and Laird C. Kirkpatrick, 4 FED. EVID.  
22 § 8:74 (3d ed. 2012). Again, the bankruptcy court's refusal to  
23 allow these statements into evidence was not an abuse of  
24 discretion as it was a straightforward and correct application of  
25 Evidence Rule 803(3). Slatkin, 525 F.3d at 811.

26 Thomas next argues that the bankruptcy court should have  
27 applied Evidence Rule 807(a)'s "residual exception" to admit his  
28 statements. Again, this is a difficult argument on appeal; a  
trial court's decision that evidence did not meet the  
requirements of Evidence Rule 807 is reviewed under the abuse of  
discretion standard. United States v. Shryock, 342 F.3d 948, 982  
(9th Cir. 2003). Indeed the Ninth Circuit has recently noted  
that:

1 Our research has disclosed only one instance where a  
2 circuit court reversed a district court to require  
3 admission of a statement under [Evidence Rule] 807.  
4 See U.S. v. Sanchez-Lima, 161 F.3d 545, 547-48 (9th  
5 Cir. 1998). However, the hearsay statements in that  
6 case were videotaped and under oath, and thus had  
7 indicators of trustworthiness that Anderson's  
8 statements do not.

9 United States v. Bonds, 608 F.3d 495, 501 (9th Cir. 2010).

10 Thomas nevertheless contends that the bankruptcy court ruled  
11 that the residual exception was inapplicable because Thomas's  
12 hearsay testimony failed to qualify for any of the specifically  
13 listed hearsay exceptions. But that argument mischaracterizes  
14 the import and meaning of the bankruptcy court's ruling. A fair  
15 reading of the entire record persuades us that the bankruptcy  
16 court declined to apply the residual exception because it  
17 concluded that Malis's out-of-court statements regarding the Debt  
18 did not satisfy the rule's requirements. In particular, in order  
19 to apply the residual exception, the bankruptcy court would have  
20 needed to determine, among other things, that the offered  
21 statements had "circumstantial guarantees of trustworthiness"  
22 equivalent to those associated with the hearsay exceptions set  
23 forth in Evidence Rules 803 and 804. See, e.g., United States v.  
24 Leal-Del Carmen, 697 F.3d 964, 974 (9th Cir. 2012) (indicia of  
25 trustworthiness included fact that witness's statement was on  
26 videotape, thus allowing trier of fact to assess demeanor, and  
27 that statements were made under oath).

28 Here, the record supports the bankruptcy court's finding  
that Malis's statements lack the required circumstantial  
guarantees. The statements were not made under oath nor were  
they recorded in any way. There was no showing that Malis was

1 under any obligation or incentive to tell the truth.

2       Indeed, the evidence in the record can be easily read to  
3 show a lack of the required circumstantial guaranties. This  
4 other evidence tended to establish that in 2009-2010, when the  
5 statements allegedly were made, Malis not only was quite elderly  
6 but also was unwell. Thomas's proposed testimony further  
7 indicated that during this period Malis was no longer able to  
8 fully manage her own financial affairs. Additionally, the  
9 relevant statements from Malis related to circumstances that were  
10 already four years old at the time she spoke with Thomas.

11       The lack of detail extended to crucial factual points: it is  
12 impossible to tell from the excluded statements when Malis  
13 thought Mbunda allegedly made the representations. Without  
14 specifics as to time, the statements left open the possibility  
15 that the alleged representations were made after Mbunda incurred  
16 the Debt, calling causation into question, as well as whether  
17 Malis actually relied upon them in making the loans.<sup>7</sup>

18       Accordingly, because the bankruptcy court had more than an  
19 adequate basis to find that Malis's statements did not have the  
20 requisite "circumstantial guarantees of trustworthiness," it did  
21 not abuse its discretion when it declined to apply the residual  
22 exception to the hearsay rule.

23       Thomas's evidentiary ruling challenges do not end there. He  
24

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25  
26       <sup>7</sup>It seems quite possible that Malis developed her  
27 understanding of her rights in relation to the Debt after the  
28 Debt was incurred. The record suggests that Malis's discussions  
with Mbunda regarding Mbunda's financial situation were ongoing  
and fluid, rather than static and limited to a single point in  
time.

1 also sought to offer his own testimony, and that of his son  
2 Patrick Van Zandt ("Patrick"), that Malis did not draft the  
3 promissory note that Thomas had agreed could be admitted in  
4 evidence ("Note"). The relevance of this proffered testimony was  
5 not that the Note failed to correctly state the terms of the  
6 Debt, but that Mbunda had forged it, thus undermining her  
7 credibility.

8 Thomas relied on Evidence Rule 701 to justify admission of  
9 this testimony, which Thomas stated would have consisted of lay  
10 opinion that Malis would never have drafted something like the  
11 Note. The bankruptcy court expressed two concerns about this  
12 offered testimony. First, the court was concerned that Evidence  
13 Rule 701 would not permit such testimony. The note was  
14 apparently typed, and there was no issue as to Mbunda's  
15 signature. Second, even if admissible, the court doubted  
16 Thomas's explanation regarding what this testimony would prove  
17 and why this testimony was relevant.

18 Like the bankruptcy court, we are also perplexed as to why  
19 Thomas stipulated to the Note's admission into evidence without  
20 reservation in light of the arguments regarding the Note that he  
21 anticipated making. If the Note were not genuine, it should not  
22 have been admitted into evidence to establish the existence of  
23 the Debt. But setting our perplexity aside, even if we were to  
24 assume that the bankruptcy court incorrectly ruled regarding the  
25 admissibility of Thomas's and Patrick's Note-related testimony,  
26 that ruling was, at most, harmless error. Nothing in Thomas's  
27 account of his and Patrick's excluded testimony reasonably could  
28 have altered the bankruptcy court's dispositive finding: that

1 there was no evidence from which the bankruptcy court could  
2 conclude Mbunda made affirmative misrepresentations regarding the  
3 Debt.

4 Generally speaking, we ignore harmless error. See Litton  
5 Loan Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 704  
6 (9th Cir. BAP 2006) (citing 28 U.S.C. § 2111, Rule 9005, Civil  
7 Rule 61, and Donald v. Curry (In re Donald), 328 B.R. 192, 203-04  
8 (9th Cir. BAP 2005)). Specifically with respect to erroneous  
9 evidentiary rulings, such rulings do not constitute reversible  
10 error unless it is more likely than not that the rulings changed  
11 the outcome of the lawsuit. See Harper, 533 F.3d at 1030.

12 Simply put, Thomas's and Patrick's Note-related testimony  
13 could not have altered the outcome of the underlying adversary  
14 proceeding even if that testimony had been admitted. The outcome  
15 of the adversary proceeding hinged on the absence of evidence  
16 from which the bankruptcy court, as the trier of fact, could find  
17 that Mbunda made affirmative misrepresentations when she incurred  
18 the Debt. The same is true for the handful of other evidentiary  
19 items that Thomas complains the bankruptcy court should not have  
20 excluded.<sup>8</sup> None of these other items of excluded evidence would  
21 have enabled the court to find that Mbunda made the requisite  
22 misrepresentations necessary to support Thomas's § 523(a)(2)(A)  
23 claim for relief.

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24  
25 <sup>8</sup>Thomas argues that the bankruptcy court should not have  
26 prevented him from: eliciting testimony from Mbunda regarding  
27 certain alleged patterns in her business-related expenditures;  
28 eliciting testimony from Mbunda regarding how many bank accounts  
she has used at various times; and requiring Mbunda to read aloud  
the contents of the Note. We do not find that any of these  
rulings constitute an abuse of discretion.



1 **2. Section 523(a)(4).**

2 Thomas also challenges the bankruptcy court's dismissal of  
3 his § 523(a)(4) claim without leave to amend. Dismissals under  
4 Civil Rule 12(b)(6) are reviewed de novo. See AlohaCare v. Haw.,  
5 Dept. of Human Servs., 572 F.3d 740, 744 n.2 (9th Cir. 2009).  
6 Under that standard, "[d]ismissal without leave to amend is  
7 improper, unless it is clear, upon de novo review, that the  
8 complaint could not be saved by any amendment.'" Intri-Plex  
9 Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1056 (9th Cir.  
10 2007) (quoting In re Daou Sys., Inc., Sec. Litig., 411 F.3d 1006,  
11 1013 (9th Cir. 2005)).

12 In pertinent part, § 523(a)(4) excepts from discharge debts  
13 incurred for "for fraud or defalcation while acting in a  
14 fiduciary capacity." § 523(a)(4). The term "fiduciary" is  
15 narrowly defined for purposes of § 523(a)(4). Honkanen v. Hopper  
16 (In re Honkanen), 446 B.R. 373, 378 (9th Cir. BAP 2011) (citing  
17 Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125  
18 (9th Cir. 2003)). In order for there to be nondischargeability  
19 under § 523(a)(4), the debtor's fiduciary capacity "must be  
20 arising from an express or technical trust that was imposed  
21 before, and without reference to, the wrongdoing that caused the  
22 debt . . . ." In re Cantrell, 329 F.3d at 1125 (quoting Lewis v.  
23 Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996)). A  
24 trust "ex maleficio" - that is, a trust imposed by law as a  
25 remedy for malfeasance or wrongful actions - will not suffice.  
26 In re Honkanen, 446 B.R. at 379. Moreover, "[t]he broad, general  
27 definition of fiduciary - a relationship involving confidence,  
28 trust and good faith - is inapplicable in the dischargeability

1 context." In re Cantrell, 329 F.3d at 1125 (quoting Ragsdale v.  
2 Haller, 780 F.2d 794, 796 (9th Cir. 1986)).

3 Despite these uncontested principles, Thomas in essence  
4 claims that the bankruptcy court should have given him the  
5 opportunity to amend his § 523(a)(4) claim to add allegations  
6 regarding the existence of a partnership.<sup>9</sup> As Thomas pointed  
7 out, partners in California have the type of fiduciary duty with  
8 respect to partnership assets that § 523(a)(4) covers. See  
9 Ragsdale 780 F.2d at 796-97.

10 But we are convinced that any amendment to the complaint  
11 attempting to fix the defects in the § 523(a)(4) claim would have  
12 been futile. When amendment would be futile, the bankruptcy  
13 court does not abuse its discretion in dismissing the complaint  
14 without leave to amend. Dougherty v. City of Covina, 654 F.3d  
15 892, 901 (9th Cir. 2011); Albrecht v. Lund, 845 F.2d 193, 195 (9th  
16 Cir. 1988). Amendment is futile when "allegation of other facts  
17 consistent with the challenged pleading could not possibly cure  
18 the deficiency.'" Id. (quoting Schreiber Distrib. Co. v.

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19  
20 <sup>9</sup>In this regard, Thomas argued on appeal:

21 While it appears clear from the record that the Court  
22 below was aware that Appellant believed that there were  
23 sufficient factual allegations that he could make that  
24 would support the existence of a partnership and hence  
25 a fiduciary duty in order to state a claim under  
26 § 523(a)(4), the Court below seems to be attempting to  
protect Appellant's interests by dissuading Appellant  
from pleading a partnership . . . .

27 Aplt. Opn'ng Br. (Feb. 3, 2012) at 11:19-24. As set forth below,  
28 the record actually reveals that Thomas admitted in open court  
that he had no other facts to allege regarding the existence of a  
partnership.

1 Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)).

2 Thomas admitted at the hearing on Mbunda's first motion to  
3 dismiss that he had no other facts to allege regarding the  
4 existence of a partnership:

5 THE COURT: You've simply pled the statute [§ 523(a)(4)].  
6 You haven't - what fact on page 3 of the complaint have  
7 you done - established anything that might fit this  
8 fiduciary preexisting partnership relationship?

9 MR. VAN ZANDT: Well, but the partnership perhaps, if -  
10 if there is one, was established at that time -

11 THE COURT: I just asked where you've mentioned it in  
12 the paper. Thats all.

13 MR. VAN ZANDT: Oh, I don't - I do not mention that  
14 there's a partnership, because I have no information  
15 that a partnership was formed, other than the facts of  
16 what happened.

17 THE COURT: You haven't even mentioned that a  
18 partnership was intended.

19 MR. VAN ZANDT: I don't know that one was.

20 Hr'g Trans. (Feb. 25, 2011) at 18:3-16.

21 Nor has Thomas identified on appeal any additional facts he  
22 was prepared to allege to shore up his partnership claim. See  
23 Dougherty, 654 F.3d at 901 (relying on a similar failure to  
24 identify additional allegations in affirming dismissal without  
25 leave to amend). A complaint must contain more than "a formulaic  
26 recitation of the elements of a cause of action." Bell Atl.  
27 Corp. v. Twombly, 550 U.S. 544, 555 (2007). It must contain  
28 "enough facts to state a claim to relief that is plausible on its  
face." Id. at 570 (emphasis added). The facts alleged must nudge  
the plaintiff's claims "across the line from conceivable to  
plausible." Id. Thomas, by his own admission, could not do that  
here. Accordingly, the bankruptcy court did not err in

1 dismissing the § 523(a)(4) claim without leave to amend.

2 **3. Section 523(a)(6).**

3 Thomas also challenges the bankruptcy court's dismissal of  
4 his § 523(a)(6) claim without leave to amend. Section 523(a)(6)  
5 excepts from discharge debts arising from willful and malicious  
6 injury. Ormsby v. First Am. Title Co. of Nev. (In re Ormsby),  
7 591 F.3d 1199, 1206 (9th Cir. 2010). In prosecuting its case, a  
8 creditor must separately plead and prove both willfulness and  
9 maliciousness. Albarran v. New Form. Inc. (In re Barboza), 545  
10 F.3d 702, 706 (9th Cir. 2008). When, as here, the bankruptcy  
11 court dismissed the claim without leave to amend, the standard of  
12 review is the same as for similar dismissals under § 523(a)(4):  
13 "[d]ismissal without leave to amend is improper, unless it is  
14 clear, upon de novo review, that the complaint could not be saved  
15 by any amendment." Intri-Plex Techs., 499 F.3d at 1056 (quoting  
16 In re Daou Sys., 411 F.3d at 1013).

17 As to the individual elements of a § 523(a)(6) claim, "[a]  
18 'willful' injury is a 'deliberate or intentional injury, not  
19 merely a deliberate or intentional act that leads to injury.'" In  
20 re Barboza, 545 F.3d at 706 (quoting Kawaauhau v. Geiger, 523  
21 U.S. 57, 61 (1998)) (emphasis in original). In order to  
22 establish a willful injury, a creditor must plead and prove that  
23 the debtor had a "subjective motive to inflict injury" or a  
24 subjective belief that injury was "substantially certain to  
25 result" from the debtor's conduct. In re Ormsby, 591 F.3d at  
26 1206 (citing Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th  
27 Cir. 2002)).

28 As an aid to determining the debtor's motives, cases under

1 § 523(a)(6) presume the debtor knows the natural consequences of  
2 his or her actions. In re Ormsby, 591 F.3d at 1206; see also In  
3 re Su, 290 F.3d at 1146 n.6 (“In addition to what a debtor may  
4 admit to knowing, the bankruptcy court may consider  
5 circumstantial evidence that tends to establish what the debtor  
6 must have actually known when taking the injury-producing  
7 action.”).

8 With respect to the second element, malicious injury, “[a]  
9 malicious injury involves (1) a wrongful act, (2) done  
10 intentionally, (3) which necessarily causes injury, and (4) is  
11 done without just cause or excuse.” Ormsby, 591 F.3d at 1207  
12 (quoting Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209  
13 (9th Cir. 2001)).

14 Thomas argues that he meets both the malicious and wilful  
15 elements of a 523(a)(6) claim for relief because he adequately  
16 pled (or could have adequately pled) a claim for elder abuse  
17 under Cal. Welfare & Insts. Code § 15610.30 (“W&I § 15610.30”).  
18 He contends that a well-pled claim under W&I § 15610.30 is co-  
19 extensive with a willful and malicious injury under § 523(a)(6).  
20 In other words, according to Thomas, if he pled (or could have  
21 pled) the elements for elder abuse under W&I § 15610.30, he  
22 necessarily would have pled (or could have pled) the elements for  
23 a nondischargeable debt under § 523(a)(6).

24 This is simply wrong. W&I § 15610.30 in relevant part  
25 provides that a person or entity commits financial abuse of an  
26 elder or dependent adult when they do any of the following:

27 (1) Takes, secretes, appropriates, obtains, or retains  
28 real or personal property of an elder or dependent

1 adult for a wrongful use or with intent to defraud, or  
2 both.

3 (2) Assists in taking, secreting, appropriating,  
4 obtaining, or retaining real or personal property of an  
elder or dependent adult for a wrongful use or with  
intent to defraud, or both.

5 (3) Takes, secretes, appropriates, obtains, or retains,  
6 or assists in taking, secreting, appropriating,  
7 obtaining, or retaining, real or personal property of  
an elder or dependent adult by undue influence, as  
defined in Section 1575 of the Civil Code.<sup>10</sup>

8 Under the plain language of W&I § 15610.30, a claim for  
9 elder abuse must include: (1) a wrongful use; (2) an undue  
10 influence/unfair advantage; or (3) an intent to defraud. The  
11 first two types of conduct covered - wrongful use and undue  
12 influence/unfair advantage - do not require any motive to injure  
13 or any belief that injury will occur. See Cal. Civ. Code § 1575;  
14 Stebley v. Litton Loan Serv., LLP, 134 Cal. Rptr. 3d 604, 608  
15 (Cal. App. 2011).

16 But a creditor such as Thomas must plead and prove a  
17 "subjective motive to inflict injury" or a subjective belief that  
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19 <sup>10</sup>Cal. Civ. Code § 1575 provides that taking or obtaining of  
20 an unfair advantage is an essential component of undue influence.  
As set forth in full, Cal. Civ. Code § 1575 states as follows:

21 **Undue influence, what.** Undue influence consists:

22  
23 1. In the use, by one in whom a confidence is reposed  
24 by another, or who holds a real or apparent authority  
25 over him, of such confidence or authority for the  
purpose of obtaining an unfair advantage over him;

26 2. In taking an unfair advantage of another's weakness  
of mind; or,

27 3. In taking a grossly oppressive and unfair advantage  
28 of another's necessities or distress.

1 injury was "substantially certain to result" from the debtor's  
2 conduct in order to succeed on a § 523(a)(6) claim. In re  
3 Ormsby, 591 F.3d at 1206 (citing In re Su, 290 F.3d at 1142).  
4 Thus, even were it true that Thomas could have pled a W&I  
5 § 15610.30 claim based upon Mbunda's wrongful use or upon some  
6 undue influence/unfair advantage Mbunda employed against Malis,  
7 Thomas could not have stated a § 523(a)(6) claim because neither  
8 of these types of conduct would have been sufficient to establish  
9 the requisite willfulness. As a consequence, even if Thomas  
10 could establish a claim under those parts of W&I § 15610.30, it  
11 would not necessarily be nondischargeable under § 523(a)(6).

12 By process of elimination, that only leaves us with the  
13 possibility that Thomas could have pled a W&I § 15610.30 claim  
14 based on an intent to defraud. Thomas, however, was allowed to  
15 proceed to trial on his fraud theories in connection with his  
16 § 523(a)(2)(A) claim for relief. And he lost; the bankruptcy  
17 court correctly found (as we held above) that Thomas lacked any  
18 factual or evidentiary basis to support his fraud theories. At  
19 no time either on appeal or before the bankruptcy court has  
20 Thomas suggested that he had any facts or evidence in support of  
21 his fraud theories other than what he already stated in his  
22 complaint and at trial. These circumstances inexorably lead us  
23 to two alternate conclusions: (1) allowing Thomas to amend his  
24 § 523(a)(6) claim would have been futile; or (2) not allowing  
25 Thomas to amend his § 523(a)(6) claim was harmless error. Under  
26  
27  
28

1 either conclusion, Thomas can not prevail.<sup>11</sup>

2 **4. Due Process**

3 Finally, Thomas argues that the bankruptcy court deprived  
4 him of due process in the course of the trial on his  
5 § 523(a)(2)(A) claim. We review due process issues de novo.  
6 Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir.  
7 2009).

8 Thomas's due process argument is twofold. First, according  
9 to Thomas, the cumulative effect of all of the bankruptcy court's  
10 adverse evidentiary rulings at trial was to deprive him of a  
11 meaningful opportunity to be heard. Second, Thomas complains  
12 that the court rushed through the scheduled one-day trial simply  
13 for the purpose of completing the trial as scheduled, which also  
14 deprived him of a meaningful opportunity to be heard.

15 An appellant, however, must show prejudice to support a due  
16 process claim. See Rosson v. Fitzgerald (In re Rosson), 545 F.3d  
17 764, 776 (9th Cir. 2008). Here, Thomas has not shown any. To  
18 the contrary, the merits analysis set forth above demonstrates  
19 that Thomas lost not because of any due process violations; he  
20 lost because he was unable to offer admissible evidence to  
21 establish his claim. There was no cumulative effect of adverse  
22 rulings because, as we set forth above, there were no incorrect  
23 evidentiary rulings. And no amount of additional time could fix  
24 that problem. In short, the absence of any prejudice shows no

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26 <sup>11</sup>The bankruptcy court dismissed Thomas's § 523(a)(6) claim  
27 on different grounds, but we may affirm on any basis reasonably  
28 found in the record. Caviata Attached Homes, LLC v. U.S. Bank,  
N.A., 481 B.R. 34, 44 (9th Cir. BAP 2012).



1 abuse of discretion, and thus is fatal to Thomas's due process  
2 claim.

3 **CONCLUSION**

4 For all of the reasons set forth above, we AFFIRM the  
5 bankruptcy court's judgment in favor Mbunda on Thomas's  
6 nondischargeability complaint.

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