

JUN 28 2011

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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-10-1327-PaJuH
)	
ARNOLD BELLOW and GAYLE BELLOW,)	Bk. No. 08-47738
)	
Debtors.)	Adv. Proc. No. 09-4160
)	
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NORTHERN CALIFORNIA SMALL BUSINESS)	
FINANCIAL DEVELOPMENT CORP.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
ARNOLD BELLOW; GAYLE BELLOW,)	
)	
Appellees.)	
)	
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Argued and Submitted on June 16, 2011
at San Francisco, California

Filed - June 28, 2011

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

Honorable Randall J. Newsome, Bankruptcy Judge, Presiding

Appearances: Malcolm Leader-Picone argued for Appellant Nor-Cal
FDC. Appellees Arnold and Gayle Bellow did not
submit briefs or appear in this appeal.

Before: PAPPAS, JURY and HOLLOWELL, Bankruptcy Judges.

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.

1 Appellant Northern California Financial Development
2 Corporation ("Nor-Cal") appeals the orders of the bankruptcy court
3 denying a continuance of the trial, denying Nor-Cal's request to
4 suspend the trial to compel the attendance of Nor-Cal's witness,
5 and granting judgment on partial findings to chapter 7² debtors
6 Arnold Bellow ("Bellow") and Gayle Bellow (together "the Bellows")
7 at the close of Nor-Cal's case-in-chief. We AFFIRM.

8
9 **FACTS**

10 Nor-Cal is a private nonprofit corporation that contracts
11 with the State of California and various organizations to provide
12 loan guaranties, and direct "micro-loans," to small and minority
13 businesses in the nine Bay Area counties of Northern California.
14 Bellow was president and CEO of Nor-Cal from 1995 to May 2008.

15 In 2003, Bellow and Randall Martinez, a Nor-Cal director,
16 formed a separate entity, VentureCal LLC ("VentureCal"). At least
17 at the beginning, VentureCal was to operate as an independent
18 agency, identifying new and different sources of funding for Nor-
19 Cal.

20 The board of directors and staff of Nor-Cal held a retreat on
21 April 19, 2008. Nor-Cal alleges, but Bellow disputes, that Bellow
22 was asked at the meeting to explain financial discrepancies in
23 Nor-Cal's operation; that Bellow stated that he would provide
24 answers and documentation within two weeks; and that he provided
25 no such information and had no further contact with the board.

26
27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Thereafter, at some point not clear in the record, Bellow was
2 terminated as President and CEO of Nor-Cal.

3 Nor-Cal engaged an accountant, Christopher Akhidenor, CPA,
4 to review all financial records of Nor-Cal. Nor-Cal alleges that
5 the audit report prepared by that accountant showed that at least
6 \$406,739 of Nor-Cal funds were misappropriated by Bellow, either
7 directly or through VentureCal.

8 The Bellows filed a chapter 7 petition on December 26, 2008.
9 On March 30, 2009, Nor-Cal filed an adversary complaint against
10 the Bellows objecting to discharge under § 727(a)(4), and for a
11 determination that Nor-Cal's claim against them was excepted from
12 discharge under §§ 523(a)(2), (4) and (6).

13 Bellows filed a motion to dismiss the complaint, to which
14 Nor-Cal objected. The bankruptcy court held a hearing on the
15 dismissal motion on May 27, 2009, at which it denied the motion
16 and set the cutoff date for discovery at November 27, 2009.

17 On June 6, 2009, the Bellows filed their answer to the
18 complaint, generally denying its allegations, and adding a
19 counter-complaint.³

20 The parties submitted a joint stipulation on December 2,
21 2009, requesting that the bankruptcy court continue the Trial-
22 Setting Conference for 120 days. The court granted the request,
23 continuing the Trial-Setting Conference to February 17, 2010.

24 At the continued Trial-Setting Conference on February 17,
25 2010, the attorney for Bellows failed to appear, and the
26 bankruptcy court continued the conference again, this time to

27 ³ The counter-complaint and its claims are not implicated in
28 this appeal.

1 March 18, 2010. The court ordered sanctions of \$200 against
2 Bellows' counsel for failure to appear.

3 At the hearing on March 18, 2010, the bankruptcy court set a
4 one-day trial for August 2, 2010. The court also granted the
5 stipulation of the parties requesting appointment of a Resolution
6 Advocate and assignment of the proceeding to the Bankruptcy
7 Dispute Resolution Program. The court added the special
8 instruction, "Mediation Session must occur by May 3, 2010."

9 The parties submitted another joint stipulation on April 30,
10 2010, requesting an extension of the mediation deadline until
11 June 24, 2010 which was granted on May 17, 2010.

12 The parties did not meet with the Resolution Advocate and did
13 not request an extension of the mediation deadline by the
14 expiration date of June 24, 2010, nor was there any communication
15 with the bankruptcy court for another month. On July 28, 2010,
16 three business days before the trial date, and on the date when
17 the parties were required to submit their trial exhibits, the
18 parties submitted a joint stipulation requesting yet another
19 extension of the deadline to complete mediation, this time to
20 September 30, 2010, and asking the bankruptcy court to vacate the
21 trial and set another Trial-Setting Conference for some date after
22 September 30, 2010. The bankruptcy court denied the relief
23 requested July 30, 2010. That same day, the parties jointly
24 submitted an emergency motion for reconsideration of the court's
25 July 30, 2010 order. There is also an entry in the docket on July
26 30, 2010, evidencing that a subpoena was issued to witness
27 Christopher Akhidenor, CPA, to attend the trial on August 3, 2010,
28 and to bring with him copies of "all audits performed for Nor-Cal,

1 report entitled 'Nor-Cal FDC Agreed-Upon Procedures for the Period
2 July 1, 2006 through June 20, 2007,' all work papers and backup
3 for the designated report."

4 The trial took place as scheduled on August 2, 2010. Nor-Cal
5 and Bellow were represented by counsel. The bankruptcy court
6 first recited on the record its reasons for denying the parties'
7 request for a continuance and reconsideration of its decision in
8 the previous week. After detailing the long period of time that
9 had passed, and in its view, that both sides of the action had
10 engaged in dilatory behavior, the court analyzed the four-part
11 test for continuances set forth in United States v. Flynt, 756
12 F.2d 1352 (9th Cir. 1985.) Concluding that the parties had not
13 shown good cause to postpone the trial again, the court then
14 directed the parties to begin the trial.

15 Both of the Bellows testified regarding Nor-Cal's denial of
16 discharge claim under § 727(a)(4). After a recess, the bankruptcy
17 court announced its decision in favor of the Bellows rejecting
18 Nor-Cal's objection to discharge. Nor-Cal has not appealed this
19 aspect of the bankruptcy court's decision.

20 The trial then proceeded on Nor-Cal's nondischargeability
21 claims. After hearing from Bellow's successor as CEO of Nor-Cal,
22 Nor-Cal's attorney requested a recess to locate the accountant he
23 had subpoenaed to appear to testify regarding the Nor-Cal books
24 and records and the audit report. After the recess, Nor-Cal's
25 lawyer informed the bankruptcy court that the accountant had not
26 appeared and that he was essential to Nor-Cal's case. Nor-Cal's
27 counsel requested that the court recess the trial so that the
28 accountant's attendance could be compelled.

1 The bankruptcy court initially resisted this suggestion,
2 especially after discovering that the accountant had been served
3 with the subpoena, together with extensive document requests, only
4 three days before the trial date. The court again detailed the
5 history of Nor-Cal's dilatory practices. Eventually, though, the
6 court relented somewhat, ordering another recess until after lunch
7 to give Nor-Cal one last chance to produce the accountant.

8 When court reconvened after lunch, the accountant still had
9 not appeared and Nor-Cal's counsel attempted to call two witnesses
10 who were not on its witness list. He explained that the witnesses
11 would provide testimony about the information in place of the
12 missing accountant. The bankruptcy court rejected this tactic
13 because, in the court's opinion, it would have been unfair to the
14 Bellows, who were not prepared to examine the newly disclosed
15 witnesses. After Bellow was recalled and examined, Nor-Cal
16 repeated its request to call the two "substitute" witnesses; the
17 court denied the request. At that point, Nor-Cal rested its case-
18 in-chief.

19 The Bellows moved to dismiss the adversary proceeding for
20 failure to state a claim, nonsuit and lack of evidence. After
21 another recess, the bankruptcy court orally reviewed each of the
22 allegations in the complaint. The court ruled that it had not
23 been presented sufficient evidence to determine if the Bellows
24 owed Nor-Cal a debt for false representations, false pretenses or
25 actual fraud, and thus Nor-Cal's claim under § 523(a)(2)(A)
26 failed. As to the § 523(a)(4) claim, the bankruptcy court ruled
27 that an officer of a corporation, like Bellow, does not have a
28 fiduciary duty to the company under applicable law, and therefore,

1 there was no evidence of defalcation; further, there was no
2 evidence of embezzlement. And regarding the claim under
3 § 523(a)(6), the bankruptcy court found that it had received
4 "absolutely no evidence" that Bellow had committed a wrongful act
5 done intentionally that necessarily caused injury to Nor-Cal, done
6 without just cause or excuse, or committed an act with a
7 subjective belief that harm was substantially certain to occur or
8 that was intended to harm.

9 The bankruptcy court based its ruling on the witness
10 testimony, noting that the documentary evidence offered by Nor-Cal
11 was largely inadmissible. The court ruled that no evidence at all
12 had been presented against Mrs. Bellows. The court ordered that
13 judgment be entered for the Bellows.

14 The court entered judgment in favor of Bellows on all claims
15 on August 11, 2010. Nor-Cal filed a timely appeal.

16

17

JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
19 and 157(b)(2)(I) and (J). We have jurisdiction under 28 U.S.C.
20 § 158.

21

22

ISSUES

23 1. Whether the bankruptcy court abused its discretion in denying
24 a motion for a continuance made three business days before
25 trial, or during trial.

26 2. Whether the bankruptcy court erred in entering a judgment on
27 partial findings against Nor-Cal.

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STANDARDS OF REVIEW

A trial court's decision to deny a continuance is reviewed for abuse of discretion. Orr v. Bank of America, 285 F.3d 764, 783 (9th Cir. 2002).

In reviewing the bankruptcy court's judgment on partial findings under Civil Rule 52(c), we review its findings of fact for clear error and legal conclusions de novo. Dubner v. City & County of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001).

DISCUSSION

I.

The bankruptcy court did not abuse its discretion in denying a continuance.

At the beginning of the trial, the bankruptcy court recited an extensive explanation why it had not granted the continuance jointly requested by the parties before trial. The court justified its decision by reference to the four-part test adopted by the Ninth Circuit in United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985):

We structure our review in accordance with four salient factors that appellate courts have considered when reviewing denials of requests for continuances. First, we consider the extent of appellant's diligence in his efforts to ready his defense prior to the date set for hearing. Second, we consider how likely it is that the need for a continuance could have been met if the continuance had been granted. Third, we consider the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses. Finally, we consider the extent to which the appellant might have suffered harm as a result of the district court's denial.

1 Id. at 1358-59 (citations omitted).⁴

2 In weighing a trial court's denial of a continuance, the
3 first criterion focuses on the extent of an appellant's diligence
4 in efforts to ready its case prior to the date set for the trial
5 or hearing. In this case, the bankruptcy court found that Nor-Cal
6 had "unequivocally not" shown diligence. The court listed the
7 numerous continuances of hearings that had been granted; that the
8 parties admitted that substantial discovery remained to be
9 completed after the discovery cutoff date; and after sixteen
10 months of delays, and several continuances for the specific
11 purpose of completing mediation, they still had not met with a
12 mediator. The bankruptcy court did not err in its finding that
13 Nor-Cal had not shown it acted diligently in preparing for the
14 trial.

15 The second criterion asks whether the requested continuance
16 would be useful. The bankruptcy court concluded from the record
17 and past performances of the parties that they would simply be
18 seeking continuances as a matter of course. In this regard, it
19 bears noting that the parties were not asking the bankruptcy court
20 just to continue the trial, but rather for an order vacating the
21 trial date and setting yet another status conference. Again, we
22 agree with the bankruptcy court that Nor-Cal did not show a
23 continuance under such circumstances would have been useful.

24 The third criterion measures the inconvenience of a

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26 ⁴ Although Flynt was a criminal proceeding decided some
27 26 years ago, it remains good law, and is also binding precedent
28 in civil proceedings. See United States v. Kloehn, 620 F.3d 1123
(9th Cir. 2010)(applying four-part test in criminal proceedings);
Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir. 2002)
(applying four-part test in civil proceedings).

1 continuance on the court and the parties. Here, the bankruptcy
2 judge noted that he would be retiring at the end of the year, that
3 the court's schedule would not allow resumption of the trial
4 before his retirement, and that it would represent an
5 inconvenience for the judge taking his docket to get up to speed
6 on an action that was almost two years old. Again, we find no
7 error in the bankruptcy court's analysis of this factor.

8 The final criterion examines whether there would be prejudice
9 to the party requesting a continuance if denied. The bankruptcy
10 court reasoned that there could be no prejudice to Nor-Cal in this
11 case, since its wounds were self-inflicted. The parties had been
12 aware since March 18 that the trial was scheduled to begin on
13 August 2nd and any documentary evidence to be submitted at trial
14 was due on July 28th. Instead of complying with the pretrial
15 instructions, on July 28, the parties requested yet another
16 continuance. The bankruptcy court observed that Nor-Cal "had not
17 done anything to try to prepare for trial." While declining to
18 continue the trial likely prejudiced Nor-Cal's ability to present
19 the best evidence it could have, we can not say the bankruptcy
20 court abused its discretion in balancing the existence of that
21 prejudice against the other relevant factors in this case.

22 Despite the bankruptcy court's express citation to the case
23 as precedent, in this appeal Nor-Cal ignores Flynt, not even
24 mentioning this decision in its briefs. Rather, in its briefs and
25 at oral argument, Nor-Cal asserted that Civil Rule 6(b)(1)
26 required the bankruptcy court to apply a "good cause" standard for
27 granting or denying a continuance. See Ahanchian v. Xenon
28 Pictures, 624 F.3d 1253 (9th Cir. 2010). Nor-Cal's position lacks

1 merit.

2 A careful reading of the Bankruptcy Rules shows that Civil
3 Rule 6(b)(1) does not apply in adversary proceedings. Unlike many
4 other Civil Rules, the Rules do not incorporate Civil Rule 6.
5 Instead, portions of Civil Rule 6 are adopted via Rule 9006, which
6 governs, generally, "enlargement" of time periods. And while some
7 of the language of Civil Rule 6(b)(1) is similar to that in Rule
8 9006(b), the provisions of Civil Rule 6(b)(1) establishing the
9 "good cause" standard for granting extensions of time are not
10 adopted in the Rules. Therefore, reliance on Ahanachian's good
11 cause standard is misplaced. Instead, Flynt and its four factors
12 apply to Nor-Cal's continuance request.

13 Nor-Cal also challenges the bankruptcy court's refusal to
14 suspend the trial and compel the attendance of Nor-Cal's
15 accountant. Again, we find no abuse of discretion by the
16 bankruptcy court.

17 According to Flynt, requests for continuances made during
18 trial to obtain the attendance of absent witnesses are subject to
19 a special set of rules.

20 In United States v. Hoyos, 573 F.2d 1111, 1114 (9th Cir.
21 1978), we set forth the showing a party ordinarily must
22 make when seeking a continuance to obtain absent
23 witnesses. This showing includes the substance of the
24 desired testimony; that the testimony would be relevant;
25 that it could be obtained if the continuance were
26 granted; and that due diligence has been exercised to
27 obtain the testimony prior to the date of the
28 proceeding. See also United States v. Sterling, 742 F.2d
521, 525 (9th Cir. 1984).

26 Flynt, 756 F.2d at 1359 n.7.

27 In this case, Nor-Cal describes the appearance and testimony
28 of the accountant, Christopher O. Akhidenor, as "critical" to

1 presentation of its case-in-chief. Akhidenor conducted the review
2 of Nor-Cal's books and records and produced the auditor's report
3 that outlined the alleged discrepancies in the records. An
4 analysis of those discrepancies formed the basis of Nor-Cal's
5 claim that Bellow misappropriated more than \$400,000 of Nor-Cal's
6 funds. Assuming Nor-Cal's representations concerning this
7 witness' role in presenting its case are correct, this would
8 appear to satisfy the first two criteria for granting a trial
9 continuance, an explanation of the substance of testimony and its
10 relevance.

11 However, under these facts, Nor-Cal's requested continuance
12 does not satisfy the remaining two requirements. Whether the
13 accountant's testimony could be obtained if a continuance was
14 granted was not shown. On the contrary, counsel for Nor-Cal
15 admitted that, in response to Nor-Cal's attorney's request that he
16 appear and testify, the accountant refused and had used profanity,
17 slammed the door in his face, and had his own attorney protest the
18 subpoena. The Ninth Circuit has held that failure to show that a
19 party can actually produce a recalcitrant witness justifies denial
20 of continuance. United States v. Fowlie, 24 F.3d 1059, 1070 (9th
21 Cir. 1994); Falls v. Yates, 2011 U.S. Dist. LEXIS 30008 *33 (E.D.
22 Cal. 2011) (in a civil case, denial of continuance proper where
23 party was previously unsuccessful in calling witness and no
24 reasonable assurance that witness would be able to comply).

25 Even assuming Nor-Cal could assure Akhidenor's presence at a
26 continued trial, the bankruptcy court found that Nor-Cal had not
27 exercised due diligence to obtain the accountant's testimony. In
28 addition to all the continuances the parties had obtained without

1 showing due diligence in preparing for trial, Nor-Cal was
2 particularly deficient in relation to the accountant. As the
3 bankruptcy court noted, the accountant was a professional CPA who
4 maintained a business office in the court's district, and the
5 accountant had been engaged by Nor-Cal. Yet Nor-Cal's attorney
6 admitted that he had not contacted the accountant before serving
7 him with a subpoena, requiring not only the accountant's presence
8 at trial, but that he produce extensive files and work papers, on
9 short notice. In the bankruptcy court's words, "to wait until
10 Friday afternoon to attempt to subpoena a professional CPA to
11 appear at a hearing on Monday morning at 9:30, it's simply
12 unreasonable." Trial Tr. at 73:23-25. We cannot disagree with
13 the bankruptcy court's decision.

14 In summary, we conclude that the bankruptcy court did not
15 abuse its discretion in denying the parties' request for a
16 continuance three business days before the trial, and denying Nor-
17 Cal's request for continuance during the trial.

18
19 **II.**

20 **The court did not err in granting Bellow's motion**
21 **for a judgment on partial findings.**

22 Civil Rule 52(c), incorporated in Rule 7052, authorized the
23 bankruptcy court to enter judgment against Nor-Cal during trial,
24 provided that Nor-Cal had been fully heard on the issues and the
25 bankruptcy court could make an appropriate disposition on the
26 evidence. A Civil Rule 52(c) judgment is reversible only if the
27 factual findings made by the trial court are clearly erroneous,
28 even though the underlying conclusions of law are reviewed de
novo. Ritchie v. United States, 451 F.3d 1019 (9th Cir. 2006);

1 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: Civil 3d ¶ 2573.1
2 (2008). The trial court is not required to draw any inferences in
3 favor of the nonmoving party; rather, the court may make findings
4 in accordance with its own view of the evidence. Ritchie,
5 451 F.3d at 1023. In deciding whether to dismiss a case or claim
6 under Civil Rule 52(c), the trial court weighs the evidence and
7 resolves the issues based on the preponderance of the evidence
8 standard. Int'l Union of Operating Eng'rs v. Ind. Constr. Corp.,
9 13 F.3d 253, 257 (7th Cir. 1994).

10 After the close of Nor-Cal's case-in-chief, counsel for
11 Bellow moved to dismiss the adversary proceeding, arguing that,
12 [Nor-Cal] hasn't established any of the elements of the
13 allegations listed in this complaint. He hasn't shown
14 that any entity was actually owed money. He hasn't
15 traced the money. There's no source documents.
16 Frankly, Your Honor, [Nor-Cal] didn't put on any
17 evidence today.

18 Trial Tr. at 92:5-13. Before ruling on Bellow's motion, the
19 bankruptcy court engaged in a colloquy with Nor-Cal's counsel
20 regarding a lack of evidence supporting Nor-Cal's § 523(a) claims:

21 THE COURT: First of all, there's been . . . not the
22 slightest bit of evidence that connects . . . Nor-Cal
23 with VentureCAL. . . . It's not at all clear to me that
24 [Bellow] did in fact profit from any of this. There's
25 no tracing of the money. . . .

26 LEADER-PICCONE [counsel for Nor-Cal]: Your Honor, the
27 evidence establishes that Mr. Bellow . . . created this
28 entity, VentureCAL. . . . [and] set about to use that
entity to basically steal money from Nor-Cal FDC. . . .

THE COURT: Excuse me. Apparently with full complicity
of Nor-Cal.

LEADER-PICCONE: Certain aspects of the VentureCal
relationship were with their complicity. . . . But what
I'm talking about here is about \$164,000 where they
billed banks for which they had no right to bill banks.

THE COURT: I have nothing before me that would indicate

1 they had no right to bill banks. . . .

2 LEADER-PICCONE: I'm reading you a [California Civil
3 Code] statute which says that the -

4 THE COURT: I don't care what the statute says; it
5 doesn't make it clear at all that what was going on here
6 was illegal. Much less that [Bellow] was personally
7 responsible or profited from it.

8 LEADER-PICCONE: These loans were the basic business of
9 Nor-Cal FDC, and [Bellow] created another entity so that
10 he could get paid twice essentially. He could get paid
11 his salary -

12 THE COURT: I have no evidence that he got paid twice -
13 none. I don't have any bank records; I don't have any
14 pay stubs; I don't have any checks. I don't have
15 anything that has his name on it - nothing in front of
16 me. Do I?

17 LEADER-PICCONE: No, Your Honor.

18 Trial Tr. at 93:1-95:8.

19 After a brief recess, the bankruptcy court returned and
20 recited its findings and conclusions on the record for each of the
21 three remaining claims presented in Nor-Cal's complaint under
22 § 523(a)(2),(4) and (6). We review the bankruptcy court's
23 decision on each claim below.

24 **A. § 523(a)(2)(A).**

25 Section 523(a)(2)(A) provides that, "A discharge under
26 section 727 . . . does not discharge an individual debtor from
27 any debt- . . . (2) for money, property, services, or an
28 extension, renewal, or refinancing of credit, to the extent
obtained, by - (A) false pretenses, a false representation, or
actual fraud, other than a statement respecting the debtor's or an
insider's financial condition[.]"

To support a claim of nondischargeability under
§ 523(a)(2)(A), the creditor must prove: (1) the debtor made . . .

1 representations; (2) that at the time he knew they were false;
2 (3) that he made them with the intention and purpose of deceiving
3 the creditor; (4) that the creditor relied on such
4 representations; and (5) that the creditor sustained the alleged
5 loss and damage as the proximate result of the misrepresentations
6 having been made. Ghomeshi v. Sabban (In re Sabban), 600 F.3d
7 1219, 1222 (9th Cir. 2010). The standard of proof for discharge
8 exceptions is preponderance of the evidence. Grogan v. Garner,
9 498 U.S. 279 (1991); Gill v. Stern (In re Stern), 345 F.3d 1036,
10 1043 (9th Cir. 2003).

11 The bankruptcy court found that Nor-Cal had presented
12 inadequate proof that Bellow had engaged in misrepresentations,
13 the lynchpin element in proving Nor-Cal's fraud claim:

14 There's nothing to suggest, I should say, that there was
15 any failure to tell or any omission or any false
16 pretense or any false representation whatsoever that was
17 made to Nor-Cal about what VentureCal was doing.
18 There's just no evidence whatsoever, even of a
19 representation or even of a scheme of some sort, a
20 fraudulent scheme on which Nor-Cal could have relied at
21 all. . . . Even if the existence and/or activities of
22 VentureCal LLC were somehow wrongful, there's been no
23 indication at all as to how [Bellow] profited from this
24 or obtained money from this. There are no bank records;
25 there are no canceled checks; there is nothing
26 whatsoever to indicate that this person, Mr. Bellow,
27 made any money off of any of this. . . .

28 Trial Tr. at 97:14-98:7. Based upon these findings, the
bankruptcy court concluded that "Even if I were to admit Exhibits
1, 2 and 3,⁵ I still would not have enough to find that somehow

25 ⁵ Exhibit 1 was the letter terminating Bellow's employment
26 as president and CEO of Nor-Cal. Exhibit 2 was a letter from Nor-
27 Cal's counsel to Bellow detailing certain financial
28 irregularities. Exhibit 3 was the auditor's report. The court
did not admit them for the truth of their contents. Trial Tr. at
(continued...)

1 there was a debt that was created by way of false representations,
2 false pretenses, or actual fraud, which is what [§] 523(a)(2) of
3 the Bankruptcy Code requires." Trial Tr. at 98:20-24.

4 The bankruptcy court's findings of fact were not clearly
5 erroneous and are well-supported by the record. The bankruptcy
6 court did not err in dismissing Nor-Cal's claim under
7 § 523(a)(2)(A).

8 **B. § 523(a)(4).**

9 Section 523(a)(4) excepts from discharge debts "for fraud or
10 defalcation while acting in a fiduciary capacity, embezzlement or
11 larceny." In an action under § 523(a)(4), a creditor must
12 establish: (1) that an express trust existed between the debtor
13 and creditor; (2) that the debt was caused by the debtor's fraud
14 or defalcation; and (3) that the debtor was a fiduciary to the
15 creditor at the time the debt was created. Otto v. Niles (In re
16 Niles), 106 F.3d 1456, 1459 (9th Cir. 1997); Nahman v. Jacks (In
17 re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001).

18 The bankruptcy court found that there was no evidence that
19 Bellow had committed a defalcation. A defalcation is the
20 "misappropriation of trust funds or money held in a fiduciary
21 capacity; failure to properly account for such funds." Lewis v.
22 Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996). The
23 bankruptcy court found that Nor-Cal had not shown an express trust
24 existed under these facts. The court further found that there was
25 no evidence that Bellow had a fiduciary duty to Nor-Cal, because
26

27
28 ⁵(...continued)
98:9-11. Nor-Cal did not appeal the court's evidentiary rulings.

1 an officer of a California corporation does not owe a fiduciary
2 duty to the corporation for § 523(a)(4) purposes. The court's
3 conclusion in this regard is consistent with Ninth Circuit and
4 California law. Cal-Micro, Inc. v. Cantrell (In re Cantrell),
5 329 F.3d 1119, 1126 (9th Cir. 2003) (noting that "California case
6 law has consistently held that while officers possess the
7 fiduciary duties of an agent, they are not trustees with respect
8 to corporate assets.").

9 The bankruptcy court also found a lack of evidence that
10 Bellow had embezzled Nor-Cal's funds. Embezzlement is defined as
11 "the fraudulent appropriation of property by a person to whom such
12 property has been entrusted or into whose hands it has lawfully
13 come." First Del. Life Ins. Co. v. Wada (In re Wada), 210 B.R.
14 572, 576 (9th Cir. BAP 1997) (quoting Moore v. United States,
15 160 U.S. 268, 269 (1895)). In the context of an exception to
16 discharge claim, embezzlement requires (1) property rightfully in
17 the possession of a nonowner, (2) a nonowner's appropriation of
18 the property to a use other than which it was entrusted, and
19 (3) circumstances indicating fraud. Transam. Commercial Finance
20 Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir.
21 1991).

22 The bankruptcy court found that there was no evidence that
23 Bellow had taken any funds, and no evidence of fraud.

24 There's no evidence whatsoever that an embezzlement
25 occurred here. In order for there to have been an
26 embezzlement, there would have to be some evidence that
27 this particular Defendant [Bellow] took money from
28 VentureCal or Nor-Cal fraudulently. And there isn't any
indication of that. As I indicated, there are no check
stubs; there are no payroll stubs; there are no
corporate records. There is nothing to indicate by way
of bank records that this person took any money of any

1 kind in a way that would have committed fraud.

2 Trial Tr. at 99:24-100:8.

3 The court therefore concluded:

4 There's simply no basis on which to establish either
5 larceny or embezzlement under 523(a)(4). So absent the
6 establishment of an express trust and thus a fiduciary
7 relationship, and absent anything that would indicate
8 embezzlement or other kind of theft, 523(a)(4) simply
9 doesn't apply.

10 Trial Tr. at 100:9-14.

11 Based on our review of the record, the bankruptcy court's
12 findings were not clearly erroneous, and its legal conclusion
13 comports with the Bankruptcy Code and case law. The bankruptcy
14 court did not err in denying Nor-Cal's claim under § 523(a)(4).

15 **C. § 523(a)(6).**

16 Section 523(a)(6) excepts debt from discharge "for willful
17 and malicious injury by the debtor to another entity or to the
18 property of another entity[.]" Whether a particular debt is for
19 willful and malicious injury by the debtor to another or the
20 property of another under § 523(a)(6) requires application of a
21 two-pronged test to the conduct giving rise to the injury. The
22 creditor must prove that the debtor's conduct in causing the
23 injuries was both willful and malicious. Barboza v. New Form,
24 Inc. (In re Barboza), 545 F.3d 702,711 (9th Cir. 2008)
25 (reinforcing Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47
26 (9th Cir. 2002) and the application of a separate analysis in each
27 prong of "willful" and "malicious").

28 "Willfulness" requires proof that the debtor deliberately or
intentionally injured the creditor or the creditor's property, and
that in doing so, the debtor intended the consequences of his act,

1 not just the act itself. Su, 290 F.3d at 1143. The debtor must
2 act with a subjective motive to inflict injury, or with a belief
3 that injury is substantially certain to result from the conduct.

4 Id.

5 For conduct to be malicious, the creditor must prove that the
6 debtor: (1) committed a wrongful act; (2) done intentionally;
7 (3) which necessarily causes injury; and (4) was done without just
8 cause or excuse. Id.

9 The bankruptcy court properly entered separate findings on
10 the willful and malicious prongs. As to wilfulness, the court
11 determined, "I have nothing to indicate – there is absolutely no
12 evidence of a wrongful act . . .that was done with a subjective
13 belief that harm was substantially certain to occur or that was
14 intended to harm." Trial Tr. at 100:21-101:1. As to the
15 malicious prong, the court found: "I have nothing to indicate –
16 there is absolutely no evidence of a wrongful act done
17 intentionally which necessarily causes injury and was done without
18 just cause or excuse[.]" Trial Tr. at 100:21-24. The court
19 completed its discussion of Nor-Cal's § 523(a)(6) case with its
20 general conclusion of law regarding all three claims for
21 nondischargeability:

22 So based on the evidence that's before me, the testimony
23 primarily, since the documents are largely inadmissible,
24 I find that the causes of action that are stated in the
25 complaint are without merit and that judgment shall
26 enter in favor of the Defendant [Bellow].

27 Trial Tr. at 101:2-6.

28 Again, based on our review of the record, the bankruptcy
29 court's findings were not clearly erroneous. The bankruptcy court
30 did not err in denying Nor-Cal a nondischargeable claim under

1 § 523(a)(2), (4) and (6).

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3

CONCLUSION

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We AFFIRM the judgment of the bankruptcy court.

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