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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-10-1409-DMkPa
	)	
PING MA and JAY LANDWOOD MA,	)	Bk. No. LA 07-18222-BR
	)	
Debtors.	)	Adv. No. LA 07-01907-BR
	)	
WEI-MIN WU,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
PING MA; JAY LANDWOOD MA,	)	
	)	
Appellees.	)	
	)	

Argued and Submitted on March 17, 2011  
at Pasadena, California

Filed - April 20, 2011

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Steven J. Coté of Chang & Coté, LLP for the Appellant.  
Stephen D. Johnson of Ardent Law Group, PC for the Appellees.

Before: DUNN, MARKELL and PAPPAS, Bankruptcy Judges.

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<sup>1</sup> 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 Creditor Wei-Min Wu initiated an adversary proceeding  
2 against the debtors, Ping Ma and Jay Ma, to except a debt from  
3 discharge under § 523(a)(2)(A)-(B), (a)(4), (a)(6) and  
4 (a)(19)(collectively, "Section 523(a) claims").<sup>2</sup> Halfway through  
5 trial, the bankruptcy court dismissed the adversary proceeding.  
6 Wu appeals the bankruptcy court's order dismissing the adversary  
7 proceeding. We AFFIRM.

8  
9 **FACTS**

10 Prepetition, Wu initiated a state court action against the  
11 debtors for fraud, conversion and other claims<sup>3</sup> in connection  
12 with Decon Engineering Co. ("Decon"), a joint venture formed for  
13 the purchase and development of real property. According to Wu,  
14 at the time of Decon's formation, each of the debtors, Wu and  
15 Ling-Shu Zhang, another investor from China, each held a 25%  
16 share in Decon in exchange for equal capital contributions.  
17 Because Wu and Zhang lived in China, the debtors controlled and  
18 managed Decon, purchasing, selling and/or developing real  
19 property on Decon's behalf. Wu alleged that the debtors borrowed  
20 against and sold several of Decon's real properties, using the

21  
22  
23 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.  
26 The Federal Rules of Civil Procedure are referred to herein as  
"Civil Rules."

27 <sup>3</sup> Wu asserted several other claims against the debtors,  
28 including breach of fiduciary duty and misappropriation of  
corporate property.

1 loan and sale proceeds for their own personal use.<sup>4</sup>

2 Three months after the debtors filed their chapter 7  
3 petition on September 18, 2007, Wu initiated the adversary  
4 proceeding against them.<sup>5</sup> As in his state court action, Wu  
5 contended that the debtors sold and borrowed against Decon's real  
6 properties, taking the sale and loan proceeds for their own use.

7 With respect to the § 523(a)(2)(A) claim, Wu alleged that,  
8 in investing in Decon, he relied on the debtors' fraudulent  
9 representations. Wu contended that the debtors induced him to  
10 invest in Decon by assuring him that they would "take good care  
11 of [his] money" and that Decon could generate "good profits" for  
12 Wu through its real property investments. Wu claimed that the  
13 debtors never intended to honor their promises, but intended to  
14 use Decon to obtain from Wu funds for their own personal use.

15 As for the § 523(a)(2)(B) claim, Wu asserted that he relied  
16 on the debtors' written representation that they had the

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17  
18 <sup>4</sup> Zhang eventually transferred her share in Decon to Wu for  
19 the purpose of filing the state court action.

20 <sup>5</sup> We note that Wu's complaint appears inadequate even at the  
21 pleading stage, as it failed to provide sufficient facts to  
22 provide plausible bases for the Section 523(a) claims. See  
23 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) ("A pleading that  
24 offers 'labels and conclusions' or 'a formulaic recitation of the  
25 elements of a cause of action will not do. Nor does a complaint  
26 suffice if it tenders 'naked assertion[s]' devoid of 'further  
27 factual enhancement.' To survive a motion to dismiss, a  
28 complaint must contain sufficient factual matter, accepted as  
true, to 'state a claim to relief that is plausible on its face.'  
A claim has facial plausibility when the plaintiff pleads factual  
content that allows the court to draw the reasonable inference  
that the defendant is liable for the misconduct alleged.")  
(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

1 financial means to contribute equal capital into Decon in  
2 deciding to invest his funds in Decon.

3 With respect to the § 523(a)(4) claim, Wu contended that the  
4 debtors had a fiduciary duty to Wu because they controlled and  
5 managed Decon on behalf of all of its shareholders. He alleged  
6 that the debtors breached their fiduciary duty by appropriating  
7 for their own use proceeds from the sale of and loans against  
8 several of Decon's real properties.

9 Wu did not elaborate grounds for the remaining claims. With  
10 respect to the § 523(a)(6) claim, Wu simply alleged that the  
11 debtors' fraudulent acts were willful and malicious. As for the  
12 § 523(a)(19) claim, Wu merely contended that the debt owed to him  
13 by the debtors resulted from a settlement agreement between Ping  
14 Ma and Sunhill Development, Inc. ("Sunhill"), another investment  
15 company.<sup>6</sup>

16 Sometime after the debtors filed their answer, the  
17 bankruptcy court set the matter for trial for July 14, 2010.<sup>7</sup> It  
18 entered a joint pretrial order, which indicated that neither Wu  
19 nor the debtors agreed on any factual and legal issues - all  
20 factual and legal issues were to be litigated at trial. All of

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21  
22 <sup>6</sup> Decon and Sunhill formed two joint ventures, East Eagle,  
23 LLC and East Globe, LLC, to develop two of Decon's real  
24 properties, both located in Chino Hills, California ("Chino Hills  
25 properties"). Sunhill later initiated a state court action  
26 against Ping Ma and Decon concerning the Chino Hills properties.  
The settlement agreement apparently resolved the state court  
action against Ping Ma and Decon.

27 <sup>7</sup> The trial initially was set for April 14, 2010, but was  
28 rescheduled for July 14, 2010, by court order (adv. proc. docket  
no. 60).

1 the legal issues in the joint pretrial order focused on Wu's  
2 Section 523(a) claims.

3 The bankruptcy court also entered an order establishing  
4 procedures for the presentation of evidence at trial ("trial  
5 procedure order"). The trial procedure order required Wu and the  
6 debtors to present direct testimony by written declaration. The  
7 trial procedure order further provided that declarations were  
8 admissible only if the declarants were present at trial for  
9 cross-examination. The trial procedure order further provided  
10 that any oral testimony at trial, other than cross-examination,  
11 would be limited to rebuttal testimony.

12 On the day of trial, the debtors attempted to submit a  
13 motion to dismiss under Civil Rule 12(b)(6) ("Civil Rule 12(b)(6)  
14 motion").<sup>8</sup> The Civil Rule 12(b)(6) motion was not entered on the  
15 adversary proceeding docket. The bankruptcy court disregarded  
16 the Civil Rule 12(b)(6) motion; at trial, the bankruptcy court  
17 stated that it "hadn't even seen it."<sup>9</sup> Tr. of July 14, 2010  
18 trial, 66:20.

19 Prior to trial, Wu submitted his trial brief and three  
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21 <sup>8</sup> At trial, counsel for Wu informed the bankruptcy court  
22 that he only managed to review the Civil Rule 12(b)(6) motion  
23 briefly, as it had been "handed to [him that] morning." Tr. of  
24 July 14, 2010 trial, 66:17-19.

25 <sup>9</sup> The bankruptcy court did not expressly state its reason  
26 for disregarding the Civil Rule 12(b)(6) motion. Presumably, the  
27 bankruptcy court did not review the Civil Rule 12(b)(6) motion  
28 because it was procedurally defective; the debtors filed the  
Civil Rule 12(b)(6) motion after they filed their answer. See  
Civil Rule 12(b)(6) (requiring that motion to dismiss for failure  
to state claim upon which relief can be granted be brought before  
pleading if responsive pleading is allowed).

1 supporting declarations: a declaration made by himself ("Wu  
2 declaration"), one by Zhang ("Zhang declaration"), and one by his  
3 attorney, Steven Coté ("Coté declaration").

4 The Coté declaration referenced various exhibits that Coté  
5 had compiled in a separately-filed "Compendium of Exhibits to  
6 Trial Brief and Related Declarations" ("Exhibit Compendium").

7 In his declaration, Wu explained that he, Zhang and the  
8 debtors formed Decon to purchase and develop real property. He  
9 explained that the debtors were entrusted with operating Decon as  
10 both he and Zhang resided in China.

11 Wu went on to describe how the debtors took out loans  
12 against the Chino Hills properties without his knowledge and  
13 consent. He asserted that Ping Ma admitted liability for the  
14 loans against the Chino Hills properties and agreed to repay  
15 those loans. He further asserted that Ping Ma admitted that she  
16 incurred debt against the Chino Hills properties because she  
17 neither followed "normal business practices" nor adhered to the  
18 "corporate management system." According to Wu, the debtors also  
19 executed an accounting that confirmed that he and Zhang invested  
20 more than \$1 million in Decon.

21 Notably, Wu did not state that the debtors made false  
22 representations to him. He did not state that the debtors knew  
23 their representations, if any were made, were false. Nor did Wu  
24 indicate that the debtors made any such representations with the  
25 intent and purpose of deceiving him into investing in Decon. He  
26 also did not indicate that he relied on the debtors'  
27 misrepresentations in investing in Decon and that he sustained  
28 damages as a result of the debtors' misrepresentations.

1 The bankruptcy court issued its evidentiary rulings on each  
2 of the declarations at the start of trial. The bankruptcy court  
3 did not admit the Zhang declaration into evidence because she was  
4 not present at trial as required under the trial procedure  
5 order.<sup>10</sup> The bankruptcy court admitted the Wu declaration into  
6 evidence, though it struck portions of the Wu declaration based  
7 on the debtors' evidentiary objections.

8 The bankruptcy court also admitted the Coté declaration into  
9 evidence, though it struck portions of the Coté declaration as  
10 well, based on the debtors' evidentiary objections. Before it  
11 issued its evidentiary ruling on the Coté declaration, the  
12 bankruptcy court questioned whether Coté could participate as a  
13 witness because he was Wu's attorney. Coté explained that he  
14 believed he could testify because his testimony did not have  
15 "anything that's of any substance to the issues that are involved  
16 in the non-dischargeability claim." Tr. of July 14, 2010 trial,  
17 5:24-25, 6:1.

18 After the bankruptcy court issued its evidentiary rulings on  
19 the declarations, the debtors again moved to dismiss the  
20 adversary proceeding, this time under Civil Rule 41(b) ("Civil  
21 Rule 41(b) motion").<sup>11</sup> The debtors did not specify any grounds  
22 for the dismissal, however; they merely claimed that "it would be  
23

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24 <sup>10</sup> According to counsel for Wu, Zhang was unable to attend  
25 trial due to illness.

26 <sup>11</sup> Counsel for the debtors did not cite the specific  
27 subsection of Civil Rule 41, but we assume that he relied on  
28 Civil Rule 41(b), as the debtors were the defendants in the  
adversary proceeding.

1 appropriate under . . . [Civil Rule 41] to make a motion to have  
2 the case dismissed."<sup>12</sup> Tr. of July 14, 2010 trial, 15:1-3. The  
3 bankruptcy court granted the debtors' motion as to Jay Ma only as  
4 "[there was] no evidence whatsoever against him." Tr. of  
5 July 14, 2010 trial, 15:7-9.

6 Midway through trial, the bankruptcy court sua sponte  
7 reconsidered the debtors' motion to dismiss as to Ping Ma. The  
8 bankruptcy court went through each of the Section 523(a) claims  
9 in light of the evidence presented at trial. The bankruptcy  
10 court ultimately concluded that the evidence before it did not  
11 support any of the Section 523(a) claims; in fact, the bankruptcy  
12 court repeatedly noted that Wu's arguments did not comport with  
13 the testimony before it.

14 With respect to the § 523(a)(2)(B) claim, the bankruptcy  
15 court did not "see anything in the evidence before [it] dealing  
16 with [financial statements]." Tr. of July 14, 2010 trial, 65:12-  
17 13. Counsel for Wu admitted that "[t]here were no financial  
18 statements." Tr. of July 14, 2010 trial, 65:15.

19 The bankruptcy court next addressed the § 523(a)(4) claim.  
20 It determined that there was no evidence showing that Ping Ma  
21 owed a fiduciary duty to Wu and embezzled his funds. Rather, the  
22 bankruptcy court found, the evidence tended to indicate that Ping  
23 Ma embezzled funds from Decon.

24 As for the § 523(a)(6) claim, the bankruptcy court  
25 determined that Wu himself did not suffer any willful and  
26

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27 <sup>12</sup> Civil Rule 41(b) applies in adversary proceedings, as  
28 incorporated by Rule 7041.



1 malicious injury by Ping Ma; rather, "any willful or malicious  
2 injury would have been against Decon." Tr. of July 14, 2010  
3 trial, 66:21-22. With respect to the § 523(a)(19) claim, counsel  
4 for Wu advised the bankruptcy court that Wu was no longer  
5 pursuing the § 523(a)(19) claim.

6 As for Wu's remaining § 523(a) claim, the bankruptcy court  
7 determined that Wu did not meet his burden of proof under  
8 § 523(a)(2)(A) because his declaration did not set forth facts  
9 establishing the elements of § 523(a)(2)(A). Specifically, the  
10 bankruptcy court found that Wu failed to assert that Ping Ma made  
11 false representations regarding Decon's real property investments  
12 and the use of Wu's investment funds. It determined that Wu also  
13 failed to state that he relied on her false representations in  
14 investing in Decon. Counsel for Wu conceded that there was  
15 nothing in the Wu declaration indicating that Ping Ma made such  
16 representations and that Wu relied on them.

17 The bankruptcy court repeatedly pointed out that Decon, not  
18 Wu, was the proper party to assert claims for relief against the  
19 debtors. It stated that "these [were] actions that Decon would  
20 have had [against the debtors], not the shareholders or owners  
21 [i.e., Wu and Zhang] of Decon." Tr. of July 14, 2010 trial,  
22 60:18-20. Counsel for Wu even admitted that the claims for  
23 relief belonged to Decon, not Wu, a Decon shareholder. The  
24 bankruptcy court then granted the debtors' motion to dismiss as  
25 to Ping Ma, based in part on its reasoning that Wu "had the wrong  
26 Plaintiff" and that "any wrong alleged in the complaint would  
27 have been done to the corporation [i.e., Decon], not to the  
28 individuals [i.e., Wu and Zhang], at least for the purposes of

1 [§] 523(a)(2), [4] and [6].” Tr. of July 14, 2010 trial, 71:19-  
2 23.

3 The bankruptcy court entered an order dismissing the  
4 adversary proceeding (“dismissal order”) on August 27, 2010.<sup>13</sup>  
5 Wu timely appealed.

6  
7 **JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C.  
9 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
10 § 158.

11  
12 **ISSUE**

13 Did the bankruptcy court err in dismissing the adversary  
14 proceeding?

15  
16 **STANDARDS OF REVIEW**

17 We review the bankruptcy court’s dismissal of an adversary  
18 proceeding for an abuse of discretion. See Morris v. Morgan  
19 Stanley & Co., 942 F.2d 648, 650 (9th Cir. 1991)(reviewing  
20 dismissal of district court action for failure to prosecute under  
21

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22 <sup>13</sup> Pursuant to the bankruptcy court’s instructions at the  
23 conclusion of trial, counsel for the debtors drafted and  
24 submitted the dismissal order to the bankruptcy court for its  
25 review and signature. The debtors incorrectly stated in the  
26 dismissal order that they moved to dismiss the adversary  
27 proceeding at the trial under Civil Rule 12(b)(6), though they  
28 moved to dismiss under Civil Rule 41(b), as reflected in the  
transcript of the trial. The bankruptcy court’s signing of the  
order with the Civil Rule 12(b)(6) reference appears to be an  
oversight.

1 Civil Rule 41(b) for abuse of discretion). Cf. United States v.  
2 Schmidt, 99 F.3d 315, 320 (9th Cir. 1996) (“A [trial court] abuses  
3 its discretion when the record contains no evidence to support  
4 its decision.”). We follow a two-part test to determine  
5 objectively whether the bankruptcy court abused its discretion.  
6 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.  
7 2009)(en banc). First, we “determine de novo whether the  
8 bankruptcy court identified the correct legal rule to apply to  
9 the relief requested.” Id. Second, we examine the bankruptcy  
10 court’s factual findings under the clearly erroneous standard.  
11 Id. at 1252 & n.20. We must affirm the bankruptcy court’s  
12 factual findings unless those findings are “(1) ‘illogical,’  
13 (2) ‘implausible,’ or (3) without ‘support in inferences that may  
14 be drawn from the facts in the record.’” Id. If we determine  
15 that the bankruptcy court erred under either part of the test,  
16 reversal for an abuse of discretion may be appropriate. Id.

17 We review the bankruptcy court’s factual findings for clear  
18 error and its legal conclusions de novo. Kuan v. Lund (In re  
19 Lund), 202 B.R. 127, 129 (9th Cir. BAP 1996). A factual finding  
20 is clearly erroneous when, although there is evidence to support  
21 it, on the entire evidence, we have a definite and firm  
22 conviction that a mistake has been committed. United States v.  
23 Ressam, 629 F.3d 793, 825 (9th Cir. 2010)(citation omitted).

24 We may affirm on any ground supported by the record. Shanks  
25 v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

## 26 27 **DISCUSSION**

28 Counsel for the debtors moved to dismiss Wu’s adversary

1 proceeding based on Civil Rule 41(b). If the bankruptcy court  
2 dismissed on that basis, it relied on an incorrect procedural  
3 ground in dismissing the adversary proceeding. We nonetheless  
4 affirm the bankruptcy court, albeit on other grounds, as  
5 supported by the record before us. See Shanks, 540 F.3d at 1086.  
6 Our reasoning follows.

7  
8 A. Standing can be raised at any time during litigation

9 We first must address Wu's argument concerning standing.  
10 According to Wu, the debtors argued for the first time in their  
11 motion to dismiss that he lacked standing to assert the  
12 Section 523(a) claims against them because the Section 523(a)  
13 claims belonged to Decon. Wu contends on appeal that the debtors  
14 should have raised the issue of standing earlier; specifically,  
15 the debtors should have included it in the joint pretrial order.

16 Contrary to Wu's contention, standing is a jurisdictional  
17 issue that can be raised at any time. United States v.  
18 Viltrakis, 108 F.3d 1159, 1160 (9th Cir. 1997). Although,  
19 regrettably, it might have saved the parties substantial time and  
20 expense for the debtors to have raised the question of standing  
21 earlier, the debtors were not required to raise the issue of  
22 standing at the pretrial stage.

23  
24 B. Dismissal is appropriate because Wu did not meet his burden  
25 of proof under § 523(a)(2)(B), (a)(4), (a)(6), (a)(19) and  
26 (a)(2)(A)

27 As we mentioned earlier, the debtors erroneously relied on  
28 Civil Rule 41(b) in moving to dismiss the adversary proceeding.  
Civil Rule 41(b) provides, in relevant part:

1 If the plaintiff fails to prosecute or to comply with  
2 these rules or a court order, a defendant may move to  
dismiss the action or any claim against it.

3 None of the bases for dismissal under Civil Rule 41(b) apply  
4 to the circumstances here. Wu clearly prosecuted the adversary  
5 proceeding; he took it all the way to trial. Wu neither failed  
6 to comply with any procedural rule nor with any court order.  
7 Civil Rule 41(b) therefore does not provide the proper procedural  
8 grounds to support dismissal.<sup>14</sup> The bankruptcy court's dismissal  
9 of the adversary proceeding was appropriate nonetheless because  
10 Wu failed to meet his burden of proof to establish any of the  
11 Section 523(a) claims.

12  
13 1. Section 523(a)(2)(B) and (a)(19)

14 Wu asserted claims under § 523(a)(2)(B) and (a)(19). The  
15 bankruptcy court summarily disposed of these two claims - with  
16 good reason.

17  
18 <sup>14</sup> Civil Rule 52 was amended in 1991 to add subdivision (c),  
19 which "authorizes the court to enter judgment at any time that it  
20 can appropriately make a dispositive finding of fact on the  
evidence." Civil Rule 52 advisory committee note to 1991  
21 amendment. According to the advisory committee note,  
22 subsection (c) replaced that part of Civil Rule 41(b) that  
formerly authorized a court to dismiss a case at the conclusion  
of the plaintiff's case if the plaintiff failed to bear an  
23 essential burden of proof. Id. Subsection (c) of Civil Rule 52  
24 essentially deleted the reference to Civil Rule 41 previously  
made in subdivision (a) of Civil Rule 52. Id. See also Lund,  
25 202 B.R. at 129 ("In 1991 [Civil Rule 41(b)] was amended to  
26 delete the portion relevant to dismissing a nonjury action on the  
merits where the plaintiff had failed to carry its burden of  
27 proof. Such motions are now considered to be motions for a  
judgment based on partial findings, and are governed by [Civil  
28 Rule 52(c)].").

1 Section 523(a)(2)(B) excepts from discharge any debt  
2 obtained "by means of a materially false written financial  
3 statement." Boyajian v. New Falls Corp. (In re Boyajian),  
4 564 F.3d 1088, 1090 (9th Cir. 2009). At trial, counsel for Wu  
5 admitted that no relevant financial statements existed. Thus,  
6 Wu's claim under § 523(a)(2)(B) fails as a matter of law.

7 Section 523(a)(19) excepts from discharge any debt resulting  
8 "from a judgment for a violation of any federal or state  
9 securities law or for common law fraud, deceit or manipulation in  
10 connection with the purchase or sale of any security." Smith v.  
11 Gibbons (In re Gibbons), 289 B.R. 588, 589 (Bankr. S.D.N.Y.  
12 2003). Here, counsel for Wu informed the court that Wu no longer  
13 wished to pursue his § 523(a)(19) claim.

14  
15 2. Section 523(a)(4)

16 Section 523(a)(4) provides that any debt for fraud or  
17 defalcation while acting in a fiduciary capacity is excepted from  
18 discharge. Under § 523(a)(4), a breach of fiduciary duty  
19 excepted from discharge concerns instances involving express or  
20 technical trusts. See Blyler v. Hemmeter (In re Hemmeter),  
21 242 F.3d 1186, 1189 (9th Cir. 2001) ("From 1884 to the present,  
22 courts have construed 'fiduciary' in the bankruptcy discharge  
23 context as including express trusts, but excluding trust ex  
24 maleficio, i.e., trusts that arose by operation of law upon a  
25 wrongful act. [The Ninth Circuit has] adhered to this  
26 construction in interpreting the scope of [§ 523(a)(4)].").

27 Section 523(a)(4) also excepts from discharge any debt  
28 incurred by embezzlement. See Transamerica Commercial Fin. Corp.

1 v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir.  
2 1991)(debt can be excepted from discharge under § 523(a)(4)  
3 without existence of fiduciary relationship). "Under federal  
4 law, embezzlement in the context of nondischargeability has often  
5 been defined as 'the fraudulent appropriation of property by a  
6 person to whom such property has been entrusted or into whose  
7 hands it has lawfully come.'" Id. (quoting Moore v. United  
8 States, 160 U.S. 268, 269 (1885). Embezzlement requires:  
9 "(1) property rightfully in the possession of a nonowner;  
10 (2) nonowner's appropriation of the property to a use other than  
11 which [it] was entrusted; and (3) circumstances indicating  
12 fraud.'" Id. (quoting In re Hoffman, 70 B.R. 155, 162 (Bankr.  
13 W.D. Ark. 1986)).

14 Here, Wu did not present any evidence establishing that  
15 there was an express trust between him and the debtors. Wu also  
16 failed to present evidence showing that the debtors embezzled  
17 funds from him. If anything, as the bankruptcy court pointed  
18 out, the evidence tends to indicate that the debtors may have  
19 embezzled funds from Decon, not Wu.

20  
21 3. Section 523(a)(6)

22 Section 523(a)(6) excepts from discharge any debt arising  
23 from willful and malicious injury by the debtor to another person  
24 or the property of another person. In re Ormsby, 591 F.3d 1199,  
25 1206 (9th Cir. 2010). The creditor must prove both willfulness  
26 and maliciousness separately. Id. A willful injury is one  
27 "when the debtor has a subjective motive to inflict injury or  
28 when the debtor believes that injury is substantially certain to

1 result from his own conduct.'" Id. (quoting Carrillo v. Su (In  
2 re Su), 290 F.3d 1140, 1146 (9th Cir. 2002)). "'A malicious  
3 injury involves (1) a wrongful act, (2) done intentionally,  
4 (3) which necessarily causes injury, and (4) is done without just  
5 cause or excuse.'" Ormsby, 591 F.3d at 1207 (quoting Petralia v.  
6 Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001)).

7 Here, Wu did not present any evidence that he personally  
8 suffered any willful and malicious injury by the debtors. The Wu  
9 declaration did not set forth any facts that meet the elements of  
10 § 523(a)(6).

11  
12 4. Section 523(a)(2)(A)

13 Section 523(a)(2)(A) excepts from discharge any debt for  
14 money, property or credit obtained by false pretenses, false  
15 representations or actual fraud. The creditor bears the burden  
16 of proving each element of its claim under § 523(a)(2)(A) by a  
17 preponderance of the evidence. Ghomeshi v. Sabban (In re  
18 Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010). The Ninth Circuit  
19 "has consistently held" that the creditor must establish each of  
20 the following five elements to make out a claim for relief under  
21 § 523(a)(2)(A):

- 22 (1) the debtor made a representation to the creditor;  
23 (2) at the time the debtor knew the representation was  
24 false;  
25 (3) the debtor made the representation with the  
26 intention and purpose of deceiving the creditor;  
27 (4) the creditor justifiably relied on the  
28 representation; and  
(5) the creditor sustained the alleged damage as the  
proximate result of the misrepresentation having been  
made.

Id.



1 Wu solely relied on his own declaration to establish his  
2 claim for relief under § 523(a)(2)(A), as Zhang's declaration was  
3 not admitted, and Coté's declaration was not probative as to any  
4 of the elements of the § 523(a)(2)(A) claim. But the Wu  
5 declaration did not provide specific facts to establish each or  
6 any of the elements of a § 523(a)(2)(A) claim. Nothing in the Wu  
7 declaration indicated that the debtors knowingly made false  
8 representations to deceive him into investing in Decon. Nothing  
9 in the Wu declaration indicated that Wu justifiably relied on the  
10 debtors' misrepresentations in investing in Decon nor that he  
11 sustained damages as a result of the debtors' misrepresentations.  
12 As the bankruptcy court pointed out, the Wu declaration  
13 essentially "had to do with [the debtors] improperly taking these  
14 loans out [with respect to Decon properties] and not properly  
15 accounting for them." Tr. of July 14, 2010 trial, 66:4-9; 68:10-  
16 12. Wu simply failed to present evidence to establish a claim  
17 for relief under § 523(a)(2)(A).

18  
19 C. Dismissal is appropriate under Civil Rule 52(c)<sup>15</sup>

20  
21 <sup>15</sup> Civil Rule 52(c) provides:

22 If a party has been fully heard on an issue during a  
23 nonjury trial and the court finds against the party on  
24 that issue, the court may enter judgment against the  
25 party on a claim or defense that, under the controlling  
26 law, can be maintained or defeated only with a  
27 favorable finding on that issue. The court may,  
28 however, decline to render any judgment until the close  
of the evidence. A judgment on partial findings must  
be supported by findings of fact and conclusions of law

(continued...)

1           Alternatively, we affirm the bankruptcy court's dismissal of  
2 the adversary proceeding under Civil Rule 52(c). See Rule 7052  
3 (Civil Rule 52 applies in adversary proceedings). Civil Rule  
4 52(c) allows a court to "grant judgment [on motion by either  
5 party or] sua sponte at any time during a bench trial, so long as  
6 the party against whom judgment is to be rendered has been 'fully  
7 heard' with respect to an issue essential to that party's case."  
8 EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 272 (3rd Cir.  
9 2010). See also Ritchie v. United States, 451 F.3d 1019, 1023  
10 (9th Cir. 2006), cert. denied, 549 U.S. 1211 (2007); 9 James Wm.  
11 Moore et al., Moore's Federal Practice § 52.50[4](3d ed. 2011)  
12 ("Moore's Federal Practice")(court has discretion to enter  
13 judgment on claim after all evidence on crucial issue has been  
14 heard and may enter judgment on its own motion).

15           The court is justified in immediately dismissing the case or  
16 claim when a party pursuing the claim fails to demonstrate the  
17 elements of the claim in fact or in law. See Stone v. Millstein,  
18 804 F.2d 1434, 1437 (9th Cir. 1986)(determining, under  
19 predecessor Civil Rule 41(b), that court may dismiss case before  
20 conclusion of plaintiff's case-in-chief when it becomes  
21 "'manifestly clear that plaintiff will not prove his  
22 case'")(quoting D.P. Apparel Corp. v. Roadway Express Inc.,  
23 736 F.2d 1, 3 (1st Cir. 1984)); Feliciano v. Rullán, 378 F.3d 42,  
24

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25           <sup>15</sup>(...continued)  
26           as required by Rule 52(a).

27           We discuss the history of Civil Rule 52(c) more fully supra  
28 n.14.

1 59 (1st Cir. 2004), cert. denied, 543 U.S. 1054 (2005) (“When a  
2 party has finished presenting evidence and that evidence is  
3 deemed by the trier insufficient to sustain the party’s position,  
4 the court need not waste time, but, rather, may call a halt to  
5 the proceedings and enter judgment accordingly.”). See also  
6 Moore’s Federal Practice § 52.50[2]. Rule 52(c) “conserves time  
7 and resources by making it unnecessary for the court to hear  
8 evidence on additional facts when the result would not be  
9 different even if those additional facts were established.” Id.

10 The “right to be ‘fully heard’ does not amount to a right to  
11 introduce every shred of evidence that a party wishes, without  
12 regard to the probative value of that evidence.” First Va.  
13 Banks, Inc. v. BP Exploration & Oil, Inc., 206 F.3d 404, 407  
14 (4th Cir. 2000). See also Granite States Ins. Co. v. Smart  
15 Modular Techs., Inc., 76 F.3d 1023, 1031 (9th Cir. 1996). The  
16 court has the discretion to enter judgment on partial findings,  
17 “even though a party has represented that it can adduce further  
18 evidence, if under the circumstances, the court determines that  
19 the evidence will have little or no probative value.” EBC, Inc.,  
20 618 F.3d at 272.

21 In deciding whether to dismiss a case or claim under Civil  
22 Rule 52(c), the court weighs the evidence and resolves the case  
23 based on the preponderance of the evidence. Int’l Union of  
24 Operating Eng’rs v. Ind. Constr. Corp., 13 F.3d 253, 257 (7th  
25 Cir. 1994). See also Ritchie, 451 F.3d at 1023 (court need not  
26 draw any inferences in favor of non-moving party but may make  
27 findings according to its own view of evidence); Moore’s Federal  
28 Practice at § 52.51.

1           During oral argument, counsel for Wu stated that he planned  
2 to prove Wu's case at trial through various documents and  
3 excerpts provided by Ping Ma, which he claimed to have attached  
4 to the Coté declaration. These documents and excerpts were not  
5 attached to the Coté declaration, but referenced therein and made  
6 part of the Exhibit Compendium. Wu did not provide the Exhibit  
7 Compendium in the record on appeal. We thus cannot determine  
8 whether the documents and exhibits in the Exhibit Compendium  
9 would have helped Wu establish the elements of his Section 523(a)  
10 claims.

11           Reviewing the documents Wu did provide in the record on  
12 appeal, we conclude that the bankruptcy court did not abuse its  
13 discretion in dismissing the adversary proceeding. Aside from  
14 his declaration, Wu only offered his live testimony at trial  
15 limited by the trial procedure order to rebuttal only, in support  
16 of his Section 523(a) claims. Admittedly, the bankruptcy court  
17 did not allow Wu to complete his testimony. What testimony Wu  
18 did provide, however, did not establish any of the elements of  
19 any of his Section 523(a) claims; his testimony held little  
20 probative value. Moreover, the trial procedure order limited  
21 Wu's testimony to rebuttal only, which would do nothing to  
22 establish any of the elements of his Section 523(a) claims. We  
23 surmise that it became "manifestly clear" to the bankruptcy court  
24 midway through trial that neither Wu's testimony nor his  
25 declaration would help prove his case. Once it determined that  
26 Wu did not present evidence sufficient to sustain his  
27 Section 523(a) claims, the bankruptcy court properly exercised  
28 its discretion to halt the trial and reconsider the debtors'

1 motion to dismiss the adversary proceeding.

2  
3 **CONCLUSION**

4 The bankruptcy court did not err in dismissing the adversary  
5 proceeding, but arguably relied on an incorrect procedure in  
6 doing so. There are sufficient grounds, supported by the record,  
7 however, for us to affirm the bankruptcy court's decision.

8 Based on our review of the record, we determine that  
9 dismissal was warranted because Wu did not meet his burden of  
10 proof to establish a claim for relief under any of the  
11 Section 523(a) claims. As an alternative ground, we determine  
12 that dismissal was warranted under Civil Rule 52(c). We AFFIRM.