FILED

MAR 18 2025

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: MICHAEL D. FROELICH, Debtor.	BAP No. NV-24-1124-FLB Bk. No. 21-12864-mkn
MICHAEL D. FROELICH, Appellant, v. EMPLOYERS MUTUAL CASUALTY COMPANY, Appellee.	Adv. No. 21-01138-mkn **MEMORANDUM**[*]

Appeal from the United States Bankruptcy Court
for the District of Nevada
Mike K. Nakagawa, Bankruptcy Judge, Presiding

Before: FARIS, LAFFERTY, and BRAND, Bankruptcy Judges.

INTRODUCTION

Appellee Employers Mutual Casualty Company ("EMCC") issued performance and payment bonds for a public works project undertaken by appellant Michael D. Froelich's contracting company. When the company

[*] 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 8024-1.

failed to complete the project, EMCC took over the job, paid the subcontractors and suppliers, and successfully sued Mr. Froelich and others under an indemnity agreement. Mr. Froelich filed a chapter 7[1] petition, and EMCC sought to have the debt declared nondischargeable under § 523(a)(4), alleging that Mr. Froelich's debt was for defalcation in a fiduciary capacity because his company received and diverted or failed to account for payments it received on the project. The bankruptcy court granted EMCC summary judgment and held that all of its losses were nondischargeable.

Mr. Froelich appeals. He does not contest the bankruptcy court's rulings that he acted in a "fiduciary capacity" or that he committed "defalcation" within the meaning of § 523(a)(4). Rather, he argues that the bankruptcy court miscalculated the amount of the nondischargeable debt.

We agree in part with Mr. Froelich: the bankruptcy court should have calculated the nondischargeable debt based on the liability arising from misappropriation of or failure to account for the trust funds, not the entirety of EMCC's losses from the breach of contract. Accordingly, we VACATE IN PART and REMAND.

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

FACTS

A. Prepetition events

Mr. Froelich was the owner and president of Construction Services Unlimited ("CSU"), a contracting business located in Nevada. CSU was awarded a public works contract with Clark County Water Reclamation District ("CCWRD"). CSU was required to post performance and payment bonds with CCWRD to guarantee the completion of the project and payment to CSU's subcontractors and suppliers.

EMCC agreed to provide the required bonds. Mr. Froelich and CSU executed a General Application and Agreement of Indemnity ("GAI"). They agreed that, if CSU failed to complete the project, EMCC may exercise its right "to take possession of any part of all of the work . . . , and at the expense of [Mr. Froelich and CSU] to complete or arrange for the completion of the same, and [Mr. Froelich and CSU] shall promptly upon demand pay to [EMCC] all losses and expenses so incurred." Similarly, Mr. Froelich and CSU agreed to indemnify EMCC "from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to interest, court costs and counsel fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur . . . ."

The GAI also imposed a trust on all payments received on account of the bonded project:

> [CSU and Mr. Froelich] covenant and agree that all

> payments received for or on account of contract(s) which are bonded by [EMCC] **shall be held as trust funds in which [EMCC] has an interest**. To secure said interest, it is agreed that **all monies paid to [CSU]** and/or [CSU and Mr. Froelich] covered by the Bond(s) **are trust funds for the benefit of and the payment for direct labor, materials and services** furnished in the prosecution of the work specified in the contract(s) for which [EMCC] may be or become liable under any of said Bond(s). The trust funds are specifically reserved as set forth above, and any breach of said duty shall be deemed a breach of the duties or obligations of [CSU and Mr. Froelich] under this Agreement of Indemnity.

(Emphases added.)

EMCC issued a performance bond and a payment bond, each in the amount of $539,750, with CSU as principal and CCWRD as obligee. Mr. Froelich signed both bonds on behalf of CSU.

CSU ultimately failed to complete the project after the Nevada State Contractor's Board revoked CSU's license in February 2015 for, among other things, failing to pay subcontractors on another public works project.

CCWRD filed a lawsuit against EMCC and others in state court to enforce the performance bond and the payment bond. EMCC and CCWRD quickly settled that litigation. EMCC agreed to take over the project and assume responsibility for its completion. CCWRD agreed to pay EMCC the balance due to CSU under the construction contract, which at that point was approximately $279,651.

EMCC completed the work and paid CSU's subcontractors and

suppliers. EMCC asserted that it paid out $661,229.80 under the performance and payment bonds.

EMCC sued Mr. Froelich and others in federal district court and sought to recover its losses under the bonds. The district court eventually entered default judgment against Mr. Froelich and others for $566,425.98, which equaled EMCC's outlays under the bonds and other damages, plus attorneys' fees and costs and pre- and postjudgment interest, minus the balance of the contract price that CCWRD paid EMCC.

B. Mr. Froelich's bankruptcy case and adversary proceeding

On June 3, 2021, Mr. Froelich commenced the underlying bankruptcy case by filing a chapter 7 petition through counsel.[2] He scheduled an unsecured claim held by EMCC for $582,239 for "Performance Bond - Garnishment."

EMCC filed a proof of claim in the amount of the default judgment ($566,425.98). It also filed an adversary complaint to have the default judgment declared nondischargeable under § 523(a)(4). It asserted that the GAI contained an express trust provision and that Mr. Froelich owed fiduciary duties to EMCC. It claimed that he failed as a trustee and fiduciary to hold money obtained from CCWRD in trust for payment of subcontractors and suppliers on the project and that he had abandoned or

[2] This was Mr. Froelich's third foray into the bankruptcy court. He had filed chapter 13 petitions in December 2016 and January 2020. The court dismissed both of those cases.

terminated the project, which constituted defalcation. EMCC contended that Mr. Froelich breached his fiduciary duties in reckless or conscious disregard of his duties as a fiduciary and trustee.

Mr. Froelich, now proceeding pro se, filed an answer in which he generally denied the allegations of the complaint.

C. The first motion for summary judgment

EMCC filed a motion for summary judgment ("First Motion"). After a hearing, the bankruptcy court granted in part and denied in part the First Motion. It concluded as a matter of law that Mr. Froelich was acting in a fiduciary capacity within the meaning of § 523(a)(4). However, it ruled that triable issues of fact existed whether the alleged debt arose from Mr. Froelich's fraud or defalcation while acting in a fiduciary capacity.

D. The second motion for summary judgment

EMCC filed a second motion for summary judgment ("Second Motion") that addressed the point that the bankruptcy court had left open and argued that Mr. Froelich's debt to EMCC was for defalcation, or, alternatively, embezzlement.

EMCC asserted that Mr. Froelich received four checks from CCWRD totaling $260,098.91, that Mr. Froelich held those funds in trust for EMCC, that he could not show that CSU used the funds to pay costs of the bonded jobs, and that he could not account for those funds. EMCC also asserted that, during the relevant period, CSU transferred significant funds from its account to Mr. Froelich's personal bank account.

EMCC argued that Mr. Froelich committed defalcation because he knew that the checks were to be used to pay suppliers and subcontractors working on the CCWRD project as required by the GAI and state standards but failed to do so.

EMCC contended that Mr. Froelich also committed defalcation when he breached his duty to account for the trust funds.

Mr. Froelich, pro se, opposed the Second Motion. He maintained that his records showed that he only received the first payment check from CCWRD and did not receive the other three checks. He claimed that he was unable to provide EMCC with the requested documents because his accountants and banks did not retain the records or the records were not available for review. But he contended that, based on the available bank statements, he could account for the funds (or at least a portion of the funds).[3]

Mr. Froelich insisted that he paid subcontractors and suppliers after receiving each payment from CCWRD, and the bank records evidenced those payments. He asserted that, "[o]f the $260k billed, CSU can account

[3] Mr. Froelich raised other arguments that he has abandoned on appeal. For example, he does not appeal the bankruptcy court's ruling that he committed defalcation (only challenging the scope of the defalcation on appeal), and he no longer maintains that EMCC did not suffer any damages because it could have completed the project at a profit. In addition, he does not challenge the bankruptcy court's earlier ruling that the GAI created an express trust or that he was acting in a fiduciary capacity. He has thus waived those arguments on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

for roughly $174k in checks with a total written out of over $206k in checks during that time period, so the facts clearly show that there was no misappropriation of funds."

He also attached exhibits, including six annotated bank statements from Bank of America, annotated e-mail correspondence, and a project completion spreadsheet.

EMCC filed a reply brief and objected to four of Mr. Froelich's exhibits (three e-mail strings and a spreadsheet) as hearsay. The bankruptcy court sustained the objections.

After a hearing, the bankruptcy court issued a detailed order granting the Second Motion. The bankruptcy court reiterated its ruling on the First Motion that Mr. Froelich was acting in a fiduciary capacity at all relevant times. It laid out the sections of the GAI (quoted above) that imposed the trust and specified the trustee's duties.

The court determined that Mr. Froelich committed defalcation while acting in a fiduciary capacity, because CCWRD made four payments to CSU, and Mr. Froelich was unable to account for CSU's use of those funds.

The bankruptcy court recounted that Mr. Froelich testified under oath that he did not have an accounting that showed what checks went to subcontractors and vendors working on the project, that he represented that CSU did not have cancelled checks that it allegedly paid to its vendors and contractors, that he maintained that CSU could not verify any of the payments received, and that he was unable to tie any particular payment to

an invoice. It considered the Bank of America statements attached to Mr. Froelich's opposition, but it concluded that they did not help him. It reviewed particular entries in the bank statements and said that some of the identifiable transfers went to Mr. Froelich's personal account, but the statements did not specify that any of the other withdrawals, debits, or checks were tied to the project or any particular activity or payee. It concluded that, "[c]onstruing the BofA Statements in a light most favorable to the Debtor, they simply do not provide a detailed showing of the recipients of the payments, the purposes for the payments, and the specific activity related to the Project."

The bankruptcy court said that Mr. Froelich commingled the trust funds with other business funds and also used the account for non-business distributions.

The bankruptcy court held that Mr. Froelich's failure to provide EMCC access to his records and documents or provide it with requested information also breached his fiduciary duties. It rejected his arguments that he could not obtain the information or that it was EMCC's fault for not obtaining the information earlier. It stated that it was his – not EMCC's – burden to account for the payments from CCWRD and that he failed to make a detailed showing of the disposition of the funds. Rather, it stated his arguments revealed a "reckless approach to his fiduciary responsibilities." It held that Mr. Froelich committed defalcation while acting in a fiduciary capacity under § 523(a)(4) and that EMCC was entitled

to judgment as a matter of law.

Finally, the bankruptcy court considered the amount of EMCC's claim. It stated that EMCC had paid $661,229.80 to contractors, subcontractors, and vendors to complete the project and to settle a state action that resulted from CSU's termination from the project. EMCC received the balance of the payments under the project contract, which totaled $280,455.14. EMCC's expenses recoverable under the GAI included attorneys' fees and costs totaling $116,669 and $1,975.86, respectively, and other expenses totaling $16,079.24. Additionally, prejudgment interest was $50,927.22.

Thus, the bankruptcy court calculated that the total of EMCC's expenses and prejudgment interest, minus the payment from CCWRD to complete the project, was $566,425.98. It granted the Second Motion and separately entered a nondischargeable judgment for $566,425.98 in EMCC's favor.

Mr. Froelich timely appealed.

JURISDICTION

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

ISSUE

Whether the bankruptcy court erred in determining that the amount of nondischargeable debt was $566,425.98.

STANDARDS OF REVIEW

The question of dischargeability of a debt is a mixed question of fact and law that this Panel reviews de novo. *See Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004). "De novo review requires that we consider a matter anew, as if no decision had been made previously." *Francis v. Wallace (In re Francis)*, 505 B.R. 914, 917 (9th Cir. BAP 2014).

However, we review factual questions – such as the bankruptcy court's calculation of damages – for clear error. *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002); *see also Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 792 (9th Cir. 1997) (approving of dischargeability determinations that "dictate de novo review of legal conclusions and clear error review of factual findings"). Factual findings are clearly erroneous if they are illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010). If two views of the evidence are possible, the court's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

We review the bankruptcy court's evidentiary rulings for an abuse of discretion. *Nava v. Cnty. of Contra Costa*, 142 F.3d 444 (9th Cir. 1998) ("Evidentiary rulings are reviewed for abuse of discretion and should not be reversed absent some prejudice."). To determine whether the bankruptcy court has abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, we consider

whether the bankruptcy court's application of the legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

DISCUSSION

A. EMCC must establish that there is no genuine dispute of material fact and that it is entitled to judgment on its § 523(a)(4) claim.

Under Civil Rule 56(a), made applicable by Rule 7056, summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The movant bears the initial burden of demonstrating an absence of a genuine dispute of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). The Ninth Circuit instructs:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. Once the moving party comes forward with sufficient evidence, the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense. A motion for summary judgment may not be defeated, however, by evidence that is merely colorable or is not significantly probative.

C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (cleaned up); *see Scott v. Harris*, 550 U.S. 372, 380 (2007) ("The mere

existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (citation omitted)). The court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in his favor. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014).

In this case, EMCC, as the plaintiff prosecuting the adversary complaint, bears the ultimate burden of proving its nondischargeability claim. Additionally, all inferences are drawn in Mr. Froelich's favor. However, if EMCC meets its initial burden, the burden shifts to Mr. Froelich to demonstrate the existence of a genuine factual dispute that would preclude summary judgment.

B. The bankruptcy court did not err in holding that Mr. Froelich committed defalcation in a fiduciary capacity.

Section 523(a)(4) precludes the discharge of debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Because "while acting in a fiduciary capacity" does not modify "embezzlement" or "larceny," and the statute is written in the disjunctive, a debt is nondischargeable if it was incurred due to (1) fraud or defalcation while acting in a fiduciary capacity, (2) embezzlement, or (3) larceny. *See Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 275 (2013); *Transamerica Com. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir. 1991).

Fraud or defalcation while acting in a fiduciary capacity under

§ 523(a)(4) requires that "1) an express trust existed, 2) the debt was caused by fraud or defalcation, and 3) the debtor acted as a fiduciary to the creditor at the time the debt was created." *Mele v. Mele (In re Mele)*, 501 B.R. 357, 363 (9th Cir. BAP 2013) (quoting *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1459 (9th Cir. 1997)). The Ninth Circuit has established a burden-shifting scheme: "the creditor bears the burden of proving that the debtor was a fiduciary to whom funds had been entrusted. The burden then shifts to debtor 'to account fully for all funds received . . . for [creditor's] benefit, by persuading the trier of fact that she complied with her fiduciary duties . . . .'" *T & D Moravits & Co. v. Munton (In re Munton)*, 352 B.R. 707, 715 (9th Cir. BAP 2006) (quoting *In re Niles*, 106 F.3d at 1462).

1. An express or technical trust

A "fiduciary capacity" for the purposes of § 523(a)(4) differs from the general definition of a fiduciary. *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003). "[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir. 1996); *see also Lovell v. Stanifer (In re Stanifer)*, 236 B.R. 709, 713-14 (9th Cir. BAP 1999) ("The meaning of 'fiduciary capacity' under § 523(a)(4) is narrowly construed to apply only to relationships involving express or technical trust relationships, and not trusts that are imposed by law as a remedy. Implied or constructive trusts, and trusts *ex maleficio* (trusts created merely on the basis of wrongful

conduct) do not create a fiduciary relationship within the purview of § 523(a)(4)." (citations omitted)). "Generally, an express trust is created by an agreement between two parties to impose a trust relationship. The general characteristics of an express trust are: (1) sufficient words to create a trust; (2) a definite subject; and (3) a certain and ascertained object or res." *In re Stanifer*, 236 B.R. at 714; *see Teamsters Local 533 v. Schultz (In re Schultz)*, 46 B.R. 880, 884-85 (Bankr. D. Nev. 1985) (Under Nevada law, "[t]he general characteristics of an express trust include an explicit declaration of the creation of a trust, a clearly defined trust res, definite beneficiaries, and a clear intention to create a trust.").

Mr. Froelich does not dispute the bankruptcy court's determination that the GAI created an express trust that imposed fiduciary obligations on him. Section 10 of the GAI provides that all payments received on the public works project "shall be held as trust funds in which [EMCC] has an interest. . . . [A]ll monies paid to [CSU or Mr. Froelich] covered by the Bond(s) are trust funds for the benefit of and the payment for direct labor, materials and services furnished in the prosecution of the work . . . ." This created an express trust as required by § 523(a)(4).

2. Defalcation while serving in a fiduciary capacity

"Defalcation" is the "misappropriation of trust funds or money held in any fiduciary capacity" or "[the] failure to properly account for such funds." *In re Lewis*, 97 F.3d at 1186 (quoting Black's Law Dictionary 417 (6th ed. 1990)); *see also Liberty Mut. Ins. Co. v. Ward (In re Ward)*, 578 B.R. 541, 551

(Bankr. E.D. Va. 2017) (holding that debtor's failure to carry out his duties as trustee of a trust amounted to "defalcation"); *Plikaytis v. Roth (In re Roth)*, 518 B.R. 63, 73 (S.D. Cal. 2014) (holding that breach of fiduciary duty in management of a business satisfies defalcation under § 523(a)(4)), *aff'd*, 662 F. App'x 540 (9th Cir. 2016).

Defalcation also "includes a culpable state of mind . . . involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock*, 569 U.S. at 269.

Mr. Froelich also does not challenge the bankruptcy court's ruling that he committed defalcation while acting in a fiduciary capacity. Even if he did challenge it, we would discern no error in the bankruptcy court's analysis. The bankruptcy court carefully reviewed the evidence submitted by the parties and determined that there was no genuine dispute of material fact that Mr. Froelich had breached his fiduciary duties by commingling the payments received from CCWRD with other business funds, misappropriating the payments for personal and general business purposes, failing to pay subcontractors and suppliers, failing to maintain documents and records necessary to carry out his fiduciary duties, and failing to provide EMCC with an accounting of the trust funds. It concluded that he had taken a "reckless approach to his fiduciary responsibilities," was aware of his trust obligations, and "consciously disregarded the risk that his conduct would violate his fiduciary duty to account for the funds received from CCWRD on the Project."

C. The bankruptcy court erred in its calculation of damages.

Mr. Froelich challenges the bankruptcy court's ruling that the entirety of his debt to EMCC was attributable to his defalcation. He mainly argues that the damages should be limited to the payments received from CCWRD that he cannot account for – in other words, roughly $86,000. We disagree with both Mr. Froelich's and the bankruptcy court's calculations of the amount of debt that resulted from his defalcation.

1. The bankruptcy court erred in determining the amount of the nondischargeable debt that resulted or arose from the defalcation.

Mr. Froelich contends that the bankruptcy court erred in attributing all of EMCC's losses to his defalcation.[4] We agree that the bankruptcy court should have determined what portion of the debt was "for" Mr. Froelich's defalcation, instead of holding that all of EMCC's damages for a standard breach of contract were nondischargeable.

Section 523(a) provides that certain categories of "debt" are not dischargeable in bankruptcy. As we have explained, one of those categories

[4] EMCC contends that Mr. Froelich did not argue the issue of attribution of the debt in the bankruptcy court, so we should not entertain it in the first instance on appeal. We disagree; although Mr. Froelich was unrepresented and did not present his arguments as well as he might have, he did enough to preserve the issue for appeal. Further, we have discretion to consider pure questions of law, even if they were not raised in the bankruptcy court, if the opposing party will not suffer prejudice. *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007). Here, the standard for determining the amount of nondischargeable debt is a pure question of law, and EMCC will not suffer any prejudice (other than having to argue the point on appeal).

is "debt" that is "for . . . defalcation while acting in a fiduciary capacity[.]" § 523(a)(4).

The structure of the statute means that adjudicating a complaint under § 523 is a two-step process: first, the court must decide whether there is a "debt"; and then the court must decide whether and to what extent that debt is "for" fiduciary defalcation.

In this case, the first step is easy: Mr. Froelich undoubtedly owes a "debt" to EMCC under the broad definition of that term. "A 'debt' is defined in the Code as 'liability on a claim,' § 101(12), a 'claim' is defined in turn as a 'right to payment,' § 101(5)(A), and a 'right to payment,' we have said, 'is nothing more nor less than an enforceable obligation.'" *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998) (explaining that an award of treble damages can be nondischargeable "debt" under § 523(a)(2)(A)).

The second step of the analysis required the bankruptcy court to determine whether and to what extent the debt is "for" fiduciary defalcation. According to the Supreme Court, "'debt for' is used throughout [§ 523(a)] to mean 'debt as a result of,' 'debt with respect to,' 'debt by reason of,' and the like, connoting broadly **any liability arising from** the specified object . . . ." *Id.* at 220 (emphasis added) (citations omitted).

In other words, "[t]he appropriate judgment amount under § 523(a)(4) is the amount of monetary damage caused by the debtor's defalcation." *Brito v. Luna (In re Luna)*, No. 7-11-14983 TA, 2013 WL

1290438, at *5 (Bankr. D.N.M. Mar. 27, 2013). This requires the bankruptcy court to ascertain the damages that arose from the defalcation, and this amount may be less than the creditor's total losses. *See Destfino v. Bockting*, 467 F. App'x 678, 681 (9th Cir. 2012) (holding that the bankruptcy court erred in calculating damages under § 523(a)(4) because the debtors' "liability is only for the funds misappropriated or unaccounted for – not for the entire amount of funds" that the creditor entrusted to the debtors); *Brown v. Kuwazaki (In re Kuwazaki)*, 438 B.R. 355, 2010 WL 3706004, at *6 (10th Cir. BAP 2010) ("[Debtor] is correct that damages for conversion or embezzlement claims are limited to money or property that was used in an unauthorized way, which means that [creditor's] damages should not include any amounts that actually were used in accordance with the parties' agreement.").

In this case, the bankruptcy court determined that the nondischargeable debt was $566,425.98, which equals EMCC's total net loss. The bankruptcy court held that all of these losses were nondischargeable under § 523(a)(4). But it made no finding – and the record on appeal does not suggest – that Mr. Froelich's defalcation while acting in a fiduciary capacity caused the entire amount of EMCC's loss.

The GAI created an express trust that imposed fiduciary duties on Mr. Froelich to hold CCWRD's payments in trust for specified purposes. As we have noted, a "fiduciary capacity" exists under § 523(a)(4) only when a technical trust exists; a technical trust exists only when there is a

"clearly defined trust res"; and the only trust res that existed in this case was the money that CSU received from CCWRD under the contract. To be sure, Mr. Froelich owed EMCC a duty to indemnify EMCC against all loss related to the project, but that duty amounted to a fiduciary duty only to the extent that trust property was involved.

This is not to say, however, that a debtor's nondischargeable liability under § 523(a)(4) is necessarily limited to the amount of misappropriated funds: "acts of defalcation, like acts of fraud, may incur more debt or liability than the actual money received." *In re Palombo*, 456 B.R. 48, 64 (Bankr. C.D. Cal. 2011) (citing *Cohen*, 523 U.S. at 222-23); *see MacArthur Co. v. Cupit (In re Cupit)*, 514 B.R. 42, 55 (Bankr. D. Colo. 2014) ("[O]nce a debt has been determined to be nondischargeable under § 523(a)(4), all of the ancillary obligations which are a part of that debt, including treble damages and interest, are also nondischargeable."), *aff'd*, 541 B.R. 739 (D. Colo. 2015). As the Supreme Court held in *Cohen*, the phrase "debt for" does not impose a "restitutionary ceiling" on the extent of the debtor's nondischargeable liability. 523 U.S. at 219. Rather, the nondischargeable debt "includ[es] treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor." *Id.* at 223. Although *Cohen* interpreted the phrase "debt for" in § 523(a)(2), the same phrase should have the same meaning in § 523(a)(4). *Id.* at 220 ("Because each use of 'debt for' in § 523(a) serves the identical function of introducing a category of nondischargeable debt, the presumption that equivalent words have

equivalent meaning when repeated in the same statute, . . . has particular resonance here.").

Thus, we hold that the bankruptcy court did not err when it included items such as EMCC's attorneys' fees and costs in the nondischargeable debt. But EMCC did not prove, and the bankruptcy court did not expressly find, that all of EMCC's losses under the bonds were "for" Mr. Froelich's fiduciary defalcation. Therefore, the bankruptcy court's calculation of the nondischargeable amount of Mr. Froelich's debt to EMCC was erroneous. We must remand so the bankruptcy court may revisit its calculations.

2. Mr. Froelich failed to show a genuine dispute of material fact as to the disposition of the trust funds.

Mr. Froelich contends that he can account for $173,994.30 of the funds that CSU received from CCWRD and that amount "should be credited" against the damages award. We disagree.

Mr. Froelich relies on the Bank of America account statements, which he claims show debits totaling $173,994.30 after CSU received four payments from CCWRD. The bankruptcy court was not persuaded by Mr. Froelich's reliance on the Bank of America statements, and neither are we. The statements only generally show withdrawals and debits. They do not identify any payee or describe the purpose of any payment. They do not show that the payments were attributable to the cost of the CCWRD project. As the bankruptcy court stated, "[c]onstruing the BoA Statements in a light most favorable to the Debtor, they simply do not provide a

detailed showing of the recipients of the payments, the purposes for the payments, and the specific activity related to the Project." These findings are not clearly erroneous.

Additionally, Mr. Froelich's assertions that CSU paid certain subcontractors and suppliers were uncorroborated. As the bankruptcy court noted, Mr. Froelich admitted that he could not produce any records or canceled checks supporting his claims. These bald assertions do not create a genuine dispute of material fact that precludes summary judgment.

At oral argument before the Panel, Mr. Froelich's counsel argued that CCWRD paid CSU in response to payment requests submitted by CSU that reflected the amounts that CSU owed to suppliers and subcontractors, and that the disbursements reflected in the bank statements matched the expenses listed in the payment requests. We reject this argument for two reasons. First, he did not make this argument in the bankruptcy court, so he has waived it on appeal. *Smith*, 194 F.3d at 1052 ("Generally, we do not consider arguments raised for the first time on appeal.").[5] Second, the

[5] The Ninth Circuit has recognized three exceptions to the general rule, none of which are applicable to this appeal:

> (1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arises while the appeal is pending because of a change in the law; or (3) the issue presented is a pure question of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.

Momox-Caselis v. Donohue, 987 F.3d 835, 841-42 (9th Cir. 2021).

premise of the argument is false. EMCC offered as exhibits single-page documents labeled "Application for Payment," but the expenses listed in those applications do not correspond to the disbursements shown in the bank statements. Therefore, the payment requests do not support Mr. Froelich's argument that CSU used some of the trust funds to pay the costs of the bonded job.

The bankruptcy court refused to consider several e-mails and a spreadsheet that Mr. Froelich attached to his opposition because they were inadmissible hearsay. This was error; on a motion for summary judgment, the question is not whether the evidence offered is admissible, but rather whether "the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Civil Rule 56(c)(2) (made applicable in adversary proceedings by Rule 7056); *see also Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) ("If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment.").

The error was arguably harmless, because Mr. Froelich did not carry his burden of showing how he could present the contents of the exhibits in an admissible form at trial. *See* Civil Rule 56(c)(2) advisory committee's note to 2010 amendment ("The burden is on the proponent to show that the

material is admissible as presented or to explain the admissible form that is anticipated."). But Mr. Froelich might have been able to carry this burden; for example, he may have successfully offered the e-mails at trial by calling the writers or recipients of the e-mails to testify. Based on our review of the excluded exhibits, however, it is far from clear that the exhibits would help Mr. Froelich show that all of the trust funds were properly used. Nevertheless, because we are remanding for a recalculation of damages, we leave it to the bankruptcy court to reevaluate these exhibits in the first instance.

However, we reject Mr. Froelich's broader argument that the bankruptcy court did not give him the latitude to which a pro se litigant is entitled. Courts in the Ninth Circuit "have an obligation to give a liberal construction to the filings of pro se litigants . . . ." *Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013). "This rule relieves pro se litigants from the strict application of procedural rules and demands that courts not hold missing or inaccurate legal terminology or muddled draftsmanship against them." *Id.* However, pro se litigants must still follow procedural rules, and "pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record." *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

The bankruptcy court did not hold Mr. Froelich's inartfulness against him. Rather, it carefully considered Mr. Froelich's arguments and the evidence.

CONCLUSION

The bankruptcy court erred when it entered judgment in the full amount of EMCC's losses without considering how much of the losses resulted from the defalcation. We therefore VACATE IN PART and REMAND. On remand, the bankruptcy court should enter judgment on the nondischargeable debt against Mr. Froelich only to the extent the debt was "for" defalcation while acting in a fiduciary capacity.