


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
June 30, 2020

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:	)	Case No.: BK-S-19-17870-MKN
	)	Chapter 11
JONATHAN R. SORELLE, M.D., PLLC,)	
<input checked="" type="checkbox"/> Affects this Debtor.	)	LEAD CASE
_____)	
In re:	)	Jointly Administered with:
	)	Case No.: BK-S-19-17871-MKN
The Minimally Invasive Hand Institute, LLC,	)	Chapter 11
<input checked="" type="checkbox"/> Affects this Debtor.)	
_____)	
In re:	)	Case No.: BK-S-19-17872-MKN
	)	Chapter 11
Jonathan R. Sorelle,)	
<input checked="" type="checkbox"/> Affects this Debtor.)	
_____)	
KIRK SCHOEB,	)	Adv. Proc. No.: 20-01039-MKN
)	
Plaintiff,)	
)	
v.	)	Date: June 10, 2020
	)	Time: 9:30 a.m.
JONATHAN R. SORELLE; MINIMALLY)	
INVASIVE HAND INSTITUTE, LLC,)	
)	
Defendants.)	
_____)	

ORDER ON MOTION TO DISMISS¹

¹ In this Order, all references to “AECF No.” are to the numbers assigned to the documents filed in this adversary proceeding as they appear on the adversary docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure.

1 On June 10, 2020, the court heard the Motion to Dismiss (“Dismissal Motion”), filed by
2 Jonathan R. Sorelle, M.D., PLLC, The Minimally Invasive Hand Institute, LLC, and Jonathan R.
3 Sorelle (collectively, the “Debtors”).² The appearances of counsel were noted on the record.
4 After arguments were presented, the matter was taken under submission.

5 BACKGROUND³

6 On March 16, 2020, Kirk Schoeb (“Plaintiff”) filed a complaint (“Complaint”)⁴ seeking
7 a determination that his claim against Debtors is nondischargeable under Section 523(a)(6).
8 (AECF No. 1).

9 On April 16, 2020, Debtors filed the instant Dismissal Motion pursuant to Bankruptcy
10 Rule 7012(b) and Civil Rule 12(b)(6). (AECF No. 6)⁵

11 On April 24, Plaintiff filed an opposition to the Dismissal Motion (as subsequently
12 amended, the “Opposition”). (AECF Nos. 7 and 9).

13 On June 3, 2020, Debtors filed a reply (“Reply”) to the Opposition. (AECF No. 13)

14 DISCUSSION

15 Debtors argue that the Complaint should be dismissed under Civil Rule 12(b)(6), made
16

17 All references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to
18 “FRE” are to the Federal Rules of Evidence.

19 ² Separate Chapter 11 proceedings were filed by each of the Debtors. The three cases are
20 jointly administered, but not substantively consolidated. As a result, a claim against one debtor
is not necessarily a claim against another debtor.

21 ³ Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the
22 docket in the above-captioned adversary proceeding. See U.S. v. Wilson, 631 F.2d 118, 119 (9th
23 Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee
Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this
case, the underlying bankruptcy case and public records.”).

24 ⁴ Plaintiff’s Complaint does not contain the correct caption required in adversary
25 proceedings, as noted by the Notices of Docketing Errors filed by the Clerk’s Office. (AECF
Nos. 3 and 8). Plaintiff has not corrected this error as of the date of this Order.

26 ⁵ It is not entirely clear why all of the Debtors filed the instant Dismissal Motion, as only
27 Jonathan R. Sorelle (“Dr. Sorelle”) is an individual who would be subject to the dischargeability
28 exceptions under Section 523(a). However, the Complaint’s failure to utilize the correct
adversary caption combined with a paragraph appearing to name The Minimally Invasive Hand
Institute as a party likely lead to this confusion. See Complaint at ¶ 5 and note 3, supra.

1 applicable herein under Bankruptcy Rule 7012, because it fails to state a claim for relief under
2 Section 523(a)(6).

3 **a. Legal Standard.**

4 Under Civil Rule 12(b)(6), the court may dismiss a complaint for “failure to state a
5 claim upon which relief can be granted....” FED. R. CIV. P. 12(b)(6). A complaint must contain
6 “a short and plain statement of the claim showing that the pleader is entitled to relief....” FED.
7 R. CIV. P. 8(a)(2). The plaintiff must plead “enough facts to state a claim to relief that is
8 plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Facial
9 plausibility exists “when the plaintiff pleads factual content that allows the court to draw the
10 reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal,
11 556 U.S. 662, 678 (2009).

12 The court “must accept as true all of the allegations contained in a complaint....” Id.
13 However, this requirement is not applicable to mere legal conclusions. Id. Thus, a complaint
14 must contain either direct or inferential allegations concerning “all the material elements
15 necessary to sustain recovery under *some* viable legal theory....” Twombly, 550 U.S. at 562,
16 quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (emphasis in
17 original). When the claims in a complaint have not crossed the line from conceivable to
18 plausible, the complaint must be dismissed. See Twombly, 550 U.S. at 570.

19 **b. Analysis.**

20 Under Section 523(a)(6), a debtor will not be granted a discharge of a particular debt
21 where there has been “willful and malicious injury by the debtor to another entity or to the
22 property of another entity....” 11 U.S.C. § 523(a)(6). By the Dismissal Motion, Debtors argue
23 that the Complaint fails to state a claim upon which relief can be granted under Section
24 523(a)(6). The court disagrees.

25 In pertinent part, the Dismissal Motion states:

- 26 1. Plaintiff’s Complaint must be dismissed because it fails to
27 state a claim for nondischargeability pursuant to Section
28 523(a)(6) of the United States Bankruptcy Code.... The
Complaint **fails to state a claim under Section 523(a)(6)**
because it does not, and cannot allege that the Debtors

1 **acted in a willful or malicious way.** In fact, none of the
2 Complaint’s allegations or evidence provide any support for
3 finding that Dr. Sorelle acted intentionally to breach the
4 standard of care.

5 2. At best, the allegations indicate a claim of negligence, but
6 nothing more. Therefore..., the Complaint must be dismissed for
7 failure to state a claim upon which relief can be granted.

8 Dismissal Motion, ¶¶ 1–2. (emphasis added).

9 Furthermore, the Dismissal Motion states:

10 11. In conjunction with the Nevada State Court action and
11 Nevada law, the Plaintiff obtained an opinion from Reid Abrams,
12 M.D. (the “**Report**”). The Report stated the following opinions:

13 It is my opinion to a reasonable degree of medical
14 probability that Jonathan Sorelle, M.D., fell below
15 the standard of care in his treatment of Kirk Schoeb.
16 [**First**, a] total wrist arthroplasty may not have been
17 indicated for Mr. Schoeb. **Second**, even assuming a
18 total wrist arthroplasty was an appropriate treatment
19 for Mr. Schoeb, Dr. Sorelle either placed the
20 prosthesis in improper alignment or, if properly
21 aligned initially, the alignment was lost within 2 days
22 postoperatively. **Third**, Dr. Sorelle should have
23 discovered the misalignment of the prosthesis shortly
24 after the operation and promptly corrected the
25 prosthesis’ misalignment or referred the patient to a
26 physician suited to address Mr. Schoeb’s complex
27 problem. Dr. Sorelle failed to do so.⁶

28 12. Dr. Abrams does not indicate that there is any evidence that
 Dr. Sorelle acted intentionally.

 Dismissal Motion, ¶¶ 11–12. (emphasis in original).

 As previously mentioned, Debtors argue that the allegations in the Complaint indicate, at
most, a claim for negligence. As such, Debtors maintain that the Complaint does not state a
claim for willful and malicious injury under Section 523(a)(6). Additionally, Debtors argue that
the Report attached to the Complaint fails to provide any evidence that Dr. Sorelle acted
intentionally.

⁶ Report of Reid Abrams, M.D. (“Report”), ¶ 5, attached as Exhibit “A” to the Complaint.

1 In Petralia v. Jercich (In re Jercich), 238 F.3d 1202 (9th Cir. 2001), the Ninth Circuit
2 held that a “willful” injury is inflicted by a debtor when the debtor’s motive was to inflict
3 injury, or the debtor believed that his conduct was substantially certain to result in injury. Id. at
4 1208. A creditor does not need to prove that the debtor acted with the specific intent to cause
5 harm. Id. at 1207-08. However, neither negligent nor reckless acts are sufficient to establish
6 that an injury is willful and malicious. See Kawauhau v. Geiger, 523 U.S. 57, 64 (1998). In
7 this instance, the Complaint alleges that Dr. Sorelle acted in “conscious disregard” of Plaintiff’s
8 rights and safety and that Dr. Sorelle could have corrected the injury in any one of Plaintiff’s
9 post-operative visits. These allegations are sufficient to plausibly infer that Dr. Sorelle’s
10 affirmative treatment and lack of subsequent corrective action was substantially certain to result
11 in Plaintiff’s injury, thereby satisfying the “willful” requirement under Section 523(a)(6).

12 To satisfy the separate “malicious” element under Section 523(a)(6), a plaintiff must
13 prove that the injury involved “(1) a wrongful act, (2) done intentionally, (3) which necessarily
14 causes injury, and (4) is done without just cause or excuse.” In re Jercich, 238 F.3d at 1209.
15 The Complaint alleges that Dr. Sorelle: (1) acted with “conscious disregard” of Plaintiff’s rights
16 and safety and knew of the prosthesis misalignment within two days after the November 11,
17 2016, implant surgery; (2) had the ability to take action and correct Plaintiff’s improperly
18 aligned prosthesis, but failed to do so; and (3) caused Plaintiff’s injury by failing to take the
19 corrective action. A plausible inference arises from these allegations that Dr. Sorelle did not
20 have “just cause or excuse” for his behavior. The Report by Plaintiff’s expert, Reid Abrams,
21 M.D. (“Dr. Abrams”) also enables the court to infer that Dr. Sorelle knew with substantial
22 certainty that Plaintiff’s injury was likely to occur from an inspection of the images of his wrist
23 taken two days after the surgery.⁷ The Complaint therefore contains sufficient factual
24 allegations to enable the court to plausibly infer that Dr. Sorelle’s treatment was “malicious”
25 under Section 523(a)(6).

26
27 ⁷ The Report is attached to the Complaint, and the Dismissal Motion does not rely on
28 materials outside of the pleadings. Therefore, the court is not required to treat the motion as one
for summary judgment under Civil Rule 56. See FED. R. CIV. P. 12(d).

1 Furthermore, the lack of explicit language in the Report regarding Plaintiff's state of
2 mind is not dispositive of the outcome of the Dismissal Motion. Section 523(a)(6) does not
3 require a plaintiff to attach an expert report to the complaint. Therefore, the failure of Report to
4 explicitly address Dr. Sorelle's mental state is not determinative of the sufficiency of the claim
5 under Section 523(a)(6).⁸

6 Having considered the written and oral arguments of counsel, the court concludes that
7 the Complaint alleges sufficient facts to give the Debtors fair notice of a legally cognizable
8 claim under Section 523(a)(6). At this point, the Complaint apparently does not explicitly
9 allege that the Debtor acted willfully and/or maliciously. However, the standard under Civil
10 Rule 12(b)(6) is satisfied when the factual allegations in the Complaint, construed most
11 favorably to Plaintiff, allows for the court to plausibly infer that the Dr. Sorelle is liable for the
12 conduct alleged. Viewing the allegations of the Complaint in the manner required, the court
13 concludes that the Complaint contains sufficient factual alleges to plausibly infer that Dr.
14 Sorelle acted willfully and maliciously within the meaning of Section 523(a)(6).

15 **IT IS THEREFORE ORDERED** that the Motion to Dismiss the Complaint, Adversary
16 Docket No. 6, be, and the same hereby is, **DENIED**.

17 **IT IS SO ORDERED.**

18
19 Copies sent via BNC to all parties and via CM/ECF ELECTRONIC FILING

20 Copies sent via BNC to:
21 JONATHAN R. SORELLE, M.D., PLLC
22 ATTN: OFFICER OR MANAGING AGENT
23 9080 WEST POST ROAD, SUITE 200
24 LAS VEGAS, NV 89148

25
26 ⁸ Although Section 523(a)(6) can encompass an intentional tort claim under state law, see
27 In re Jercich, 238 at 1206-07, it is unnecessary to satisfy the requirements of state law to allege
28 willful and malicious injury. Attachment of the Report to the instant Complaint might have been
necessary to file a complaint for medical malpractice under Nevada law, see NRS 41A.071, but it
was unnecessary in this adversary proceeding.

1 THE MINIMALLY INVASIVE HAND INSTITUTE, LLC
2 ATTN: OFFICER OR MANAGING AGENT
3 9080 WEST POST ROAD, SUITE 200
4 LAS VEGAS, NV 89148

5 JONATHAN R. SORELLE
6 39 MOONFIRE DRIVE
7 LAS VEGAS, NV 89135

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