

  
Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 27, 2020

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	
	)	Case No.: 19-17296-MKN
I SELA CONCEPCION GOMEZ DE	)	Chapter 13
HINES,	)	
	)	
Debtor.	)	
	)	
RELS VALUATION; TIFFANY DIAZ,	)	Adv. Proc. No.: 20-01062-MKN
	)	
Plaintiffs,	)	
vs.	)	Date: July 22, 2020
	)	Time: 9:30 a.m.
I SELA CONCEPCION GOMEZ DE	)	
HINES,	)	
	)	
Defendant.	)	

**ORDER ON MOTION TO DISMISS PLAINTIFFS' ADVERSARY COMPLAINT<sup>1</sup>**

On July 22, 2020, in the above-captioned adversary proceeding, the court heard the Motion to Dismiss Plaintiffs' Adversary Complaint ("Dismissal Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

<sup>1</sup> In this order, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "Bankruptcy Rule" are to the provisions of the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure.

**BACKGROUND**

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2 On November 13, 2019, Isela Concepcion Gomez De Hines (“Debtor”), filed a Chapter  
3 13 petition. (ECF No. 1). On the same date, notice of the bankruptcy (“Bankruptcy Notice”)  
4 was mailed to all creditors listed by the Debtor. (ECF No. 4). The Bankruptcy Notice sets forth  
5 a number of deadlines for creditors to take certain actions, including a deadline of January 22,  
6 2020, to file proofs of claim, and a deadline of February 18, 2020, to file complaints challenging  
7 the dischargeability of certain debts.

8 On January 22, 2020, an order was entered granting relief from stay in favor of RELS  
9 Valuation and Tiffany Diaz dba TMD Appraisals (collectively “RELS”). (ECF No. 31). That  
10 order granted relief from stay (“RAS Order”) with respect to a civil action pending in the Eighth  
11 Judicial District Court, Clark County, Nevada (“State Court”), entitled Isella C. Gomez de Hines  
12 v. Wells Fargo Bank N.A., et al., Case No. A-16-735881-C (“State Litigation”). Debtor  
13 commenced that action in 2017 by filing a complaint (“State Complaint”) naming various  
14 defendants, including RELS. Debtor’s complaint asserted various causes of action, including  
15 breach of contract, breach of duty of good faith and fair dealing, negligence, unjust enrichment,  
16 and fraud. On September 12, 2019, after a bench trial in the State Litigation, findings of fact and  
17 conclusions of law (“FFCL”) were entered, resulting in a dismissal of the Debtor’s claims with  
18 prejudice. On November 5, 2019, a minute order was entered awarding \$30,000 in attorney’s  
19 fees to RELS. Because the automatic stay arose when the Debtor filed her bankruptcy petition  
20 on November 13, 2019, RELS sought and obtained the RAS Order. That order permitted RELS  
21 to obtain a final order in the State Litigation (“Final Order”) as to their requests for attorney’s  
22 fees and costs.

23 On June 2, 2020, RELS filed a complaint commencing the above-captioned adversary  
24 proceeding (“Adversary Complaint”), seeking a determination that the Debtor’s obligation under  
25 the Final Order is excepted from discharge. (AECF No. 1).<sup>2</sup> RELS alleges that Debtor’s  
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28 <sup>2</sup> Nothing in the record indicates that RELS obtained an extension of the February 18,  
2020, deadline to file a complaint objecting to dischargeability of debts.

1 prosecution of the State Litigation caused willful and malicious injury in the amount of \$30,000  
2 that is nondischargeable under Section 523(a)(6).

3 On June 12, 2020, Debtor filed the instant Dismissal Motion under Civil Rule 12(b)(6).  
4 (AECF No. 6).

5 On July 8, 2020, RELS filed an opposition. (AECF No. 9).

6 On July 14, 2020, Debtor filed a reply. (AECF No. 10).

### 7 DISCUSSION

8 The Adversary Complaint alleges that the causes of action asserted by the Debtor in her  
9 State Complaint were resolved against the Debtor. Apparently, Debtor alleged in the State  
10 Complaint that she relied on an appraisal prepared by RELS of certain real property that the  
11 Debtor purchased as her residence. See Adversary Complaint at ¶¶ 10 and 13. In the Adversary  
12 Complaint, RELS alleges that Debtor’s purported reliance on the RELS appraisal was resolved  
13 against the Debtor at trial because the Debtor had never seen the RELS appraisal before  
14 purchasing the residence. Id. at ¶¶ 10, 12, 13, and 16. RELS alleges in the Adversary Complaint  
15 that it made an offer of judgment before trial, see id. at ¶ 14, that the Debtor presumably had  
16 rejected. RELS further alleges that because its offer of judgment had been rejected, it sought an  
17 award of attorney’s fees in the amount of \$42,300.50, that the State Court reduced to \$30,000.  
18 Id. at ¶¶ 20 and 21. After relief from stay was granted, the State Court entered its Final Order  
19 awarding the \$30,000 in attorney’s fees and costs. Id. at ¶ 26. Based on the FFCL entered by the  
20 State Court in resolving the State Litigation against the Debtor, RELS alleges that by “filing an  
21 unsubstantiated and fraudulent lawsuit against [RELS] in the State [Litigation], [Debtor] caused  
22 willful and malicious injury to [RELS] that resulted in court-ordered damages to [RELS] in the  
23 amount of \$30,000.” Id. at ¶ 29. RELS therefore asserts that “the debt owed by [Debtor] to  
24 [RELS] is not dischargeable pursuant to § 523(a)(6) of the Bankruptcy Code.” Id. at ¶ 30.

1           Instead of answering the Adversary Complaint, Debtor filed this instant Dismissal  
2 Motion under Civil Rule 12(b)(6).<sup>3</sup> Under that rule, a complaint may be dismissed for “failure to  
3 state a claim for which relief may be granted.” The standard for dismissing a claim under this  
4 rule is whether the complaint alleges sufficient factual matter to state a claim for relief that is  
5 plausible on its face. See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). Because a motion  
6 under Civil Rule 12(b)(6) addresses only the sufficiency of the pleadings, the introduction of  
7 documents, materials or evidence outside of the pleadings requires that the motion be treated as a  
8 motion for summary judgment. See Civil Rule 12(d) (“If, on a motion under Rule 12(b)(6) or  
9 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion  
10 must be treated as one for summary judgment under Rule 56.”). Having considered the  
11 allegations of the Complaint, the materials submitted, and the written and oral arguments of  
12 counsel, the court concludes that the Dismissal Motion must be granted, but with leave to amend.  
13 Several reasons require this conclusion.

14           First, RELS’s claim is brought under Section 523(a)(6) which is not even listed as an  
15 exception to a discharge in Chapter 13. See 11 U.S.C. §1328(a)(2). Rather, in Chapter 13 an  
16 exception exists for any debt “for restitution, or damages, awarded in a civil action against the  
17 debtor as a result of willful or malicious injury by the debtor that caused personal injury to an  
18 individual.” 11 U.S.C. §1328(a)(4). Compare 11 U.S.C. §523(a)(6) (“a discharge under section  
19 727 . . . does not discharge an individual debtor from any debt . . . for willful and malicious  
20 injury by the debtor to another entity or to the property of another entity.”).<sup>4</sup> See also  
21 Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998) (“debts arising from recklessly or negligently  
22 inflicted injuries do not fall within the compass of § 523(a)(6).”); In re Brubaker, 57 B.R. 736,  
23 740 (Bankr. W.D. Va. 1986) (“Negligence, even gross negligence, is insufficient to satisfy the

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25 <sup>3</sup> Because no answer has been filed, Debtor has yet to raise any objection to the  
26 Adversary Complaint being filed on June 2, 2020, well after the February 18, 2020 deadline to  
27 file such complaints in this Chapter 13 proceeding.

28 <sup>4</sup> Unlike Section 1328(a)(4), a nondischargeable debt under Section 523(a)(6) does not  
require proof of a personal injury.

1 necessary elements of malice or willfulness.”). It is unclear whether the attorney’s fees awarded  
2 in the Final Order are encompassed by the term “restitution” or “damages.” Moreover, it is  
3 unclear whether the Debtor’s alleged conduct “caused personal injury” to RELS because the  
4 Final Order appears to represent an economic injury rather than a personal injury.<sup>5</sup> Compare In  
5 re Grossman, 538 B.R. 34, 41-44 (Bankr. E.D. Cal. 2015)(personal injury under 1328(a)(4)  
6 excludes property damage but includes bodily injury and nonphysical injuries such as emotional  
7 distress and invasion of privacy). On its face, the claim asserted in the Adversary Complaint is  
8 not an exception to a discharge in Chapter 13 and is not a plausible basis for relief.<sup>6</sup>

9 Second, the “willful injury” standard typically applied under Section 523(a)(6) is applied  
10 under Section 1328(a)(4). See In re Grossman, 538 B.R.at 39. The willful injury standard is met  
11 “only when the debtor has a subjective motive to inflict injury or when the debtor believes that  
12 injury is substantially certain to result from his own conduct.” Delannoy v. Woodlawn Colonial,  
13 L.P. (In re Delannoy), 615 B.R. 572, 584 (B.A.P. 9th Cir. 2020), quoting Carillo v. Su (In re Su),  
14 290 F.3d 1140, 1142 (9th Cir. 2002) (emphasis added). This standard is in the disjunctive and is

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16 <sup>5</sup> An offer of judgment is a fee-shifting procedure designed to encourage the exchange of  
17 reasonable settlement offers during litigation. See, e.g., Lepome v. Berkson (In re Estate &  
18 Living Trust of Miller), 216 P.3d 239, 243 (Nev. 2009) (fee award based on rejected offer of  
19 judgment includes fees on appeal). A trial court’s decision to award attorney’s fees based on an  
20 offer of judgment requires consideration of numerous factors, including (1) whether the  
21 plaintiff’s claim was brought in good faith, (2) whether the offer was reasonable and in good  
22 faith in both its timing and amount, (3) whether the decision to reject the offer was grossly  
23 unreasonable or in bad faith, and (4) whether the fees sought are reasonable and justified in  
24 amount. See Beattie v. Thomas, 668 P.2d 268, 274 (Nev. 1983). An award of attorney’s fees  
25 based on a rejected offer of judgment does not require a determination of the intentions of the  
26 opposing party but does require consideration of the foregoing factors. Id. at 274 (“In the instant  
27 case, the district court found only that the settlement offers . . . had been reasonable and in good  
28 faith. The district court took no evidence and made no findings on the other factors mentioned  
above. We therefore reverse the district court’s award . . . and remand for a redetermination on  
the record of the amount of attorney’s fees to be awarded in light of the factors enumerated in  
this opinion.”). See, e.g., KH Real Estate Investment Fund, LLC v. Lily L.H. Kong Trust, 2019  
WL 989871, at \*3 (Nev. Ct. of App. Feb. 27, 2019)(affirming award where all four factors  
applied).

27 <sup>6</sup> Because the deadline for challenging the dischargeability of certain debts expired on  
28 February 18, 2020, it appears that no applicable basis for challenging the discharge of debts in  
this Chapter 13 proceeding under Section 1328(a)(4) has ever been filed.

1 satisfied by proof of the Debtor's malign intent or the Debtor's subjective belief. Unlike a claim  
2 under Section 523(a)(6), Section 1328(a)(4) does not require additional proof of malicious  
3 injury. Even without that additional requirement, however, the Adversary Complaint is deficient  
4 because there are no factual allegations that the Debtor had a subjective motive to inflict injury  
5 on RELS by commencing and prosecuting the State Litigation, or in rejecting the offer of  
6 judgment. Likewise, there are no factual allegations that the Debtor believed that  
7 commencement or continued prosecution of the State Litigation, or refusal of the offer of  
8 judgment, would cause personal injury to RELS. Rather, based on its deficient allegations,  
9 RELS simply concludes that the Debtor "caused willful and malicious injury." Merely reciting  
10 the language of a statute is not sufficient to state a claim for relief. See Ashcroft v. Iqbal, 129  
11 S.Ct. at 678.

12 Third, the "malicious injury" standard typically applied under Section 523(a)(6) also is  
13 applied under Section 1328(a)(4). See In re Grossman, 538 B.R. at 39. The malicious injury  
14 standard is met by demonstrating that the injury "involves (1) a wrongful act, (2) done  
15 intentionally, (3) which necessarily causes injury, and (4) is done without just cause and excuse."  
16 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Unlike a claim under  
17 Section 523(a)(6), Section 1328(a)(4) does not require additional proof of willful injury. Even  
18 without that additional requirement, the Adversary Complaint is deficient because there are no  
19 factual allegations that Debtor's commencement and continued prosecution of the five causes of  
20 action alleged in the State Complaint was wrongful or without just cause and excuse, or that her  
21 rejection of the offer of judgment was wrongful or without just cause and excuse. RELS alleges  
22 that the Debtor did not prevail on any of those causes of action, but that allegation is not the legal  
23 equivalent. Likewise, there is no factual allegation that the Debtor intended to commit a  
24 wrongful act, or that commencement and continued prosecution of the five causes of action  
25 alleged in the State Complaint necessarily caused injury. Such allegations must be pled and  
26 proven to prevail on a nondischargeable claim for malicious injury under Section 1328(a)(4). If  
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1 the requirement was otherwise, any individual debtor who unsuccessfully sues to recover an  
2 affirmative claim prior to bankruptcy might subject to a claim for nondischargeability.<sup>7</sup>

3 Finally, the parties do not dispute that the Dismissal Motion goes far beyond the  
4 pleadings by attaching not only a copy of the FFCL entered in the State Litigation, but also a  
5 copy of the recorder's transcript of the second day of the bench trial. Under Civil Rule 56(a),  
6 summary judgment may be granted only if "the movant shows that there is no genuine dispute as  
7 to any material fact and that the movant is entitled to judgment as a matter of law." For the  
8 reasons explained, the allegations of the Adversary Complaint are deficient and do not state a  
9 claim for which relief may be granted irrespective of the attachments to the Dismissal Motion.  
10 Treatment of the motion as seeking relief under Civil Rule 56(a) is inappropriate, however,  
11 because the court cannot conclude that an amendment to the Adversary Complaint would be  
12 futile.<sup>8</sup> If RELS files an amended complaint, either party may seek summary judgment through  
13 the mechanism set forth in Local Rule 7056.

14 **IT IS THEREFORE ORDERED** that the Motion to Dismiss Plaintiffs' Adversary  
15 Complaint, brought by Defendant Isela Concepcion Gomez De Hines, Adversary Docket No. 6,  
16 be, and the same hereby is, **GRANTED WITH LEAVE TO AMEND**.

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19 <sup>7</sup> Under Nevada law, a claim for abuse of process requires proof of "(1) an ulterior  
20 purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of  
21 the legal process not proper in the regular conduct of the proceeding . . . An ulterior purpose is  
22 any improper motive underlying the issuance of legal process . . . It is not necessary to show  
23 malice or want of probable cause to recover for abuse of process." Black v. Bonnie Springs  
24 Family Ltd. P'Ship (In re Black), 487 B.R. 202, 212 (B.A.P. 9th Cir. 2013). RELS apparently  
25 did not obtain a judgment against the Debtor on a claim for abuse of process for her  
26 commencement and prosecution of the State Litigation. If RELS had done so, it might seek to  
27 rely on such a judgment for issue preclusive effect in this adversary proceeding. Id. at 214 (state  
28 court abuse of process judgment given issue preclusive effect on willful injury element of  
Section 523(a)(6) claim).

<sup>8</sup> If Debtor responds to an amended complaint filed under Section 1328(a)(4) as being  
time-barred pursuant to Bankruptcy Rule 4007(c), see Anwar v. Johnson (In re Johnson), 720  
F.3d 1183, 1189 (9th Cir. 2013), the result may be that an otherwise sufficiently pled claim is  
dismissed with prejudice. As mentioned at note 2, supra, there appears to be no stipulation or  
order in the record extending the deadline for an objection under Section 1328(a)(4) to be filed.

1       **IT IS FURTHER ORDERED** that plaintiffs in the above-captioned adversary  
2 proceeding shall file and serve an amended complaint, if at all, **no later than August 10, 2020.**

3       **IT IS FURTHER ORDERED** that a status conference in the above-captioned adversary  
4 proceeding will be held by telephonic appearance only **on August 19, 2020, at 9:30 a.m.,** before  
5 the assigned judge.

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7 Copies sent via CM/ECF ELECTRONIC FILING

8 Copies sent via BNC to:

9 ISELA CONCEPCION GOMEZ DE HINES  
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