Dated: April 13 2016

John P. Gustafson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 15-31959
	)	
John P. Hixon,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 15-3108
	)	
Motorists Mutual Insurance Company,	)	Judge John P. Gustafson
	)	
Plaintiff,	)	
v.	)	
	)	
John P. Hixon,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on Defendant/Debtor's Motion to Dismiss with Prejudice ("Motion") [Doc. # 5], which the court will construe as a Motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

Motorists Mutual Insurance Company ("Plaintiff") commenced this proceeding on October 2, 2015, by filing a Complaint [Doc. # 1] objecting to Defendant/Debtor's ("Defendant") discharge pursuant to 11 U.S.C. § 523(a)(6). On November 2, 2015, Defendant filed a Response to Plaintiff's

Complaint [Doc. # 4] together with his Motion. [Doc. # 5]. The court held a hearing on the motion, at which Plaintiff's attorney appeared by telephone and Defendant's attorney appeared in person. For the reasons that follow, Defendant's motion will be granted.

FINDINGS OF FACT

Unless otherwise noted, the following facts are not in dispute. Plaintiff Motorists Mutual Insurance Company holds an unsecured claim against John P. Hixon, the Defendant/Debtor. The claim arises from an incident that occurred on April 30, 2008 when Defendant, while negligently operating a motor vehicle, "caused a collision to occur between the motor vehicle he was operating and a motor vehicle operated by the 'Insured'." [Doc. # 1, ¶ 7].

As a result of the incident, Defendant was convicted of aggravated vehicular assault in violation of Ohio Revised Code Section 2903.08, a felony of the third degree. [Doc. # 1-1, Pl. Ex. A]. O.R.C. § 2903.08 states, in pertinent part:

> (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:
> ....
> (2) In one of the following ways:
> (a) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a *reckless* operation offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (E) of this section;
> (b) *Recklessly.*

Ohio Rev. Code Ann. § 2903.08 (West)(emphasis added).

After the incident, Plaintiff was required to pay the Insured "the sum of $90,000.00 under the Uninsured Motorist coverage provision" and became subrogated in that amount. [Doc. # 1, ¶ 9]. On December 30, 2009, Plaintiff obtained a default judgment against Defendant in the Clark County Common Pleas Court, in the amount of $90,000.00, plus costs and interest at the statutory rate. [Doc. # 1-2, Pl. Ex. B].

On June 16, 2015, Defendant filed his Chapter 7 petition [Case No. 15-31959, Doc. # 1]. Plaintiff commenced this adversary proceeding on October 2, 2015, seeking a denial of Defendant's

discharge and a judgment entered in its favor against Defendant in the amount of the $90,000.00 state court judgment, plus interest at the rate of 3% [Doc. # 1]. The court notes that in the Complaint, Plaintiff alleged that Defendant "negligently" operated the motor vehicle that caused the incident. [Doc. # 1, ¶ 7].

At a pre-trial hearing held on the matter, the court stated on the record that it would construe Defendant's Motion to dismiss as one brought under Rule 12(b)(6). It further stated that if Plaintiff intended to file a response to the motion, it must be filed in seven days. Plaintiff did not file a response to the Motion.

LAW AND ANALYSIS

A. Rule 12(b)(6) Standard

Defendant moves to dismiss this case under Rule 12(b)(6), which applies in this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012, for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 8(a)(2) provides that a claim for relief must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In deciding a Rule 12(b)(6) motion to dismiss, "the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint 'contains enough facts to state a claim to relief that is plausible on its face.'" *United States v. Ford Motor Co.*, 532 F.3d 496, 502 (6th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

While Rule 8(a)(2) does not require a complaint to set out detailed factual allegations, a "[p]laintiff's obligation to provide the 'grounds' for their claimed entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Rondigo, LLC v. Township of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555). Rather, "to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

The United States Supreme Court explained the "plausibility" standard first set forth in *Twombly*:

> 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted

> unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "
> . . . .
> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009).

B. Discussion

Plaintiff's Complaint sets forth a series of facts and allegations it believes are grounds for excepting its $90,000.00 state court judgment from Defendant's discharge. The Complaint's sole claim is brought pursuant to 11 U.S.C. § 523(a)(6). Accepting the factual allegations in the complaint as true, the court finds that Plaintiff has not alleged sufficient facts to state a plausible claim under 11 U.S.C. § 523(a)(6).

1. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge any debt caused by a debtor's willful and malicious conduct, providing:

> "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> ....
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]"

To be entitled to a judgment that a debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). The terms "willful" and malicious" as used in the statute are distinct concepts, and Plaintiff needs to establish the existence of both elements to prevail on a claim of nondischargeability. *Markowitz*, 190 F.3d at 463 (6th Cir. 1999).

Addressing the "willful" requirement of § 523(a)(6), the Supreme Court agreed that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished

from negligent or reckless torts" and held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). A willful injury thus occurs when "(I) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (*citing Markowitz*, 190 F.3d at 464). Under §523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)).

In the Complaint, Plaintiff does not plead any facts or allegations that allow the court to find that the pleader is entitled to relief under § 523(a)(6). As a result of the incident that led to Plaintiff being subrograted in the amount of $90,000.00, Defendant was found guilty of aggravated vehicular assault under O.R.C. § 2903.08. Aggravated vehicular assault is an offense dealing with the reckless operation of a motor vehicle. It is not a statute that brings forth a conviction sounding in the "willful and malicious" conduct discussed in Section 523(a)(6) of the Bankruptcy Code and in the U.S. Supreme Court case of *Kawaauhau v. Geiger*.

To be granted relief under its claim, Plaintiff must allege that Defendant not only willfully and maliciously caused the automobile accident at issue, but that Defendant also willfully and maliciously intended the injury that occurred. There are no such facts or allegations in Plaintiff's Complaint. On the contrary, Plaintiff stated that Defendant "negligently" operated the motor vehicle which caused the accident. However, "[m]ere negligence is not sufficient to except a debt from discharge under § 523(a)(6)." *Cash Am. Fin. Servs. v. Fox (In re Fox)*, 370 B.R. 104, 119 (6th Cir. BAP 2007). Thus, in construing the Complaint in the light most favorable to Plaintiff, and accepting all factual allegations as true, the court finds that there are not sufficient facts to state a claim under Section 523(a)(6) upon which relief can be granted.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Defendant's Motion to Dismiss [Doc. # 5] be, and hereby is, **GRANTED**. The court will enter a separate order of dismissal in accordance with this Memorandum of Decision and Order.

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