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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re Thomas Anthony Brill, <div style="text-align: center;">Debtor.</div> <hr/> Marta Rodriguez, <div style="text-align: center;">Plaintiff,</div> <div style="text-align: center;">v.</div> Thomas Anthony Brill, <div style="text-align: center;">Defendant.</div> <hr/>	}	Case No. 14-13358-B-7 Adversary Proc. No. 14-1126
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**ORDER DISMISSING ADVERSARY PROCEEDING
REGARDING DISCHARGEABILITY OF DEBTS**

Steven D. Smith, Esq., of SD Smith, Esquire, PLLC, appeared on behalf of the plaintiff, Marta Rodriguez.

Robert S. Williams, Esq., of Williams & Williams, Inc., appeared on behalf of the defendant/debtor, Thomas Anthony Brill.

In this adversary proceeding, the plaintiff Marta Rodriguez (“Rodriguez”) seeks to determine the dischargeability of various claims she asserts against the debtor, Thomas Anthony Brill (the “Debtor”). Rodriguez has now made four attempts to plead a plausible claim for relief in compliance with the Federal Rules of Civil and Bankruptcy Procedure. The court has thrice dismissed *sua sponte* Rodriguez’s complaints with leave to amend in response to the court’s concerns. The third amended complaint (“TAC”) is now before the court.

1 Rodriguez is the Debtor's former spouse. Prior to their marriage in 2005,
2 they co-habitated and worked together in the Debtor's law practice for a number of
3 years. Rodriguez contends that during that time, the Debtor made numerous
4 representations and agreements which he did not fulfill. The TAC purports to seek
5 relief under 11 U.S.C. § 523 subsections (a)(5) and (a)(15)¹ with regard to a
6 marital dissolution action filed by the Debtor in 2006 (referred to herein as the
7 "Dissolution Action"). Rodriguez also seeks relief to pursue the claims she asserts
8 in a state court civil action arising from the parties' premarital relationship
9 (referred to herein as the "Marvin Action").² The TAC also makes vague
10 references to fraud and willful malicious injury claims (hereafter the "Tort
11 Claims"). It is not clear that the Tort Claims are different from similar tort claims
12 she asserts in the Marvin Action. The Tort Claims would only be
13 nondischargeable if Rodriguez can properly plead and prove those claims under §
14 523 subsections (a)(2)(A) and (6). None of Rodriguez's pleadings contain a short
15 plain statement of her claims showing that she is entitled to, or needs relief from
16 this court. It is difficult to "dissect" her various claims and the applicable
17 subsections of § 523 that would apply to each. For the reasons set forth below, it
18 does not appear that Rodriguez can plead a claim sufficient to except her Marvin
19 Action and Tort Claims from the Debtor's chapter 7 discharge. As to any Marvin
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21
22 ¹Unless otherwise indicated, all chapter, section and rule references are to the
23 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy
24 Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of
2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

25 ²The term "Marvin Action" refers to a 1976 decision by California Supreme
26 Court in which the court ruled that nonmarital partners have the right to enforce express
27 and implied agreements for support and property division after separation. *Marvin v.*
28 *Marvin*, 18 Cal. 3d. 660 (1976). Marvin Actions are also referred to as "palimony"
actions. They are initiated and prosecuted in the state court in the form of a general
civil action. Marvin Actions may be prosecuted in conjunction with a marital
dissolution action, however dissolution actions are initiated and prosecuted in the
family law court.

1 Action and Tort Claims, the adversary proceeding will be dismissed with
2 prejudice. As to any claims arising in the Dissolution Action that properly fall
3 within the scope of § 523 subsections (a)(5) and (a)(15), the adversary proceeding
4 will be dismissed without prejudice to further prosecution of the Dissolution
5 Action in the state court.

6 For purposes of this ruling, the court must accept as true the factual
7 allegations in the operative pleadings. Therefore, no findings of fact are necessary
8 or appropriate. This order does contain the court's conclusions of law. The court
9 has jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C. § 523 and
10 General Orders 182 and 330 of the U.S. District Court for the Eastern District of
11 California. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

12 **Procedural Background.**

13 This bankruptcy commenced with a voluntary petition for relief under
14 chapter 7 on June 30, 2014. Rodriguez is listed on Schedule F as the Debtor's only
15 general unsecured creditor with an unliquidated, disputed claim in an unknown
16 amount. Rodriguez timely commenced this adversary proceeding, without
17 counsel, on October 24, 2014 (Doc. No. 1; the "Initial Complaint"). The Initial
18 Complaint included three claims for relief. Rodriguez sought a determination that
19 her various claims against the Debtor are based on actual fraud (§ 523(a)(2)(A));
20 willful and malicious injury (§ 523(a)(6)); and a domestic support obligation
21 (§ 523(a)(5)). The Debtor filed an answer (Doc. No. 7) which included affirmative
22 defenses based on the statute of limitations and failure to state a claim for relief.
23 The Debtor requested that the first and second claims for relief be dismissed and
24 that Rodriguez be required to plead her claims with more specificity.

25 The first status conference was held on January 8, 2015. In a civil minute
26 order dated the same day (Doc. No. 10), the court dismissed the Tort Claims with
27 leave to amend and set a date by which the amended complaint had to be filed.
28 The court also directed that no responsive pleading was required on the domestic

1 support claim unless and until ordered by the court after review of the sufficiency
2 of any amended pleadings.

3 On January 29, 2015, attorney Steven D. Smith, Esq. (“Attorney Smith”)³
4 filed a notice of appearance as counsel for Rodriguez (Doc. No. 28) and a first
5 amended complaint on her behalf (Doc. No. 29; the “FAC”). The FAC essentially
6 restated the claims under § 523 subsections (a)(2)(A), (a)(5) and (a)(15). It
7 dropped the willful malicious injury claim and replaced it with a new claim for
8 relief under § 523(a)(4) based on a fiduciary fraud theory.⁴ A further status
9 conference was held on February 5, 2015.

10 After reviewing the FAC, the court *sua sponte* dismissed the FAC with
11 leave to amend the first, second, and third claims for relief for reasons relating to
12 the form and sufficiency of the pleadings. By civil minute order dated February 5,
13 2015 (Doc. No. 32), the court directed Rodriguez to plead her fraud claims with
14 particularity and to address the five elements of fraud; to specifically identify the
15 nature of the alleged fiduciary relationship, and to separately plead the § 523(a)(5)
16 and (a)(15) claims. The status conference was again continued to March 5, 2015,
17 with no responsive pleading required.

18 On February 23, 2015, Rodriguez filed an ex parte motion for a two-week
19 extension of time to file the second amended complaint (Doc. No. 35; the “Motion
20 to Extend Time”). In that Motion, Rodriguez expressed her intention to also file a
21 motion for abstention. In support of the Motion, Rodriguez filed a copy of a recent
22 opinion from the Fifth Appellate District reversing a prior dismissal of the Marvin
23 Action (discussed below), and remanding and reinstating the Marvin Action to the
24 state court for further proceedings (Doc. No. 36; the “Appellate Opinion”). The
25

26 ³Attorney Smith is also counsel of record for Rodriguez in the Marvin Action.

27 ⁴By the time the FAC was filed, the Debtor’s discharge had been entered and the
28 bar date for asserting new objections, which did not relate back to the same set of facts,
had passed.

1 Motion to Extend Time was based on Attorney Smith’s need for time to study the
2 Appellate Opinion, to further investigate the available evidence which might
3 support Rodriguez’s fraud claims, and to file the abstention motion.

4 On February 28, 2015, the court granted Rodriguez’s Motion to Extend
5 Time. The second amended complaint was filed with three exhibits on February
6 26, 2015 (Doc. Nos. 39-42; the “SAC”). In the SAC, Rodriguez again attempted
7 to restate her claims under § 523 subsections (a)(5) and (a)(15). She dropped her
8 fraud claim (subsection (a)(2)(A)) and tried to reintroduce a claim for willful
9 malicious injury (subsection (a)(6)).

10 The motion to abstain was filed on March 12, 2015 (Doc. No. 48; the
11 “Abstention Motion”). In the Abstention Motion, Rodriguez asked the court to
12 abstain from adjudicating any of the dischargeability issues asserted in the SAC,
13 and to allow both the reinstated Marvin Action and the Dissolution Action to
14 proceed in the state court. The status conference was continued to be heard with
15 the Abstention Motion. On April 9, 2015, the court denied the Abstention Motion
16 without prejudice. After reviewing the pleadings in the SAC, the court again *sua*
17 *sponte* dismissed the adversary proceeding with leave to amend not later than April
18 30, 2015.

19 After the court denied the Abstention Motion, on April 30, 2015, Rodriguez
20 amended her Abstention Motion (Doc. No. 60). Consequently, the court continued
21 the status conference and extended the date for filing amended pleadings to May
22 28, 2015.⁵ The amended Abstention Motion requested essentially the same relief
23 as the initial Motion, however the amended Motion included copies of the
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26 ⁵On June 3, 2015, Rodriguez filed a pleading entitled “Motion for Leave to File
27 Complaint to Annul Transfers” (the “Ex Parte Motion”). In the Ex Parte Motion,
28 Rodriguez alleges that the Debtor made avoidable transfers of cash to his current
spouse. Those allegations appear to be totally unrelated to the adversary proceeding in
which the Ex Parte Motion was filed. The Ex Parte Motion was denied on June 10,
2015.

1 complaint which had been filed in the state court on November 2, 2006, to initiate
2 the Marvin Action (Doc. No. 61) and a judgment which had been entered on
3 February 4, 2008, in the Dissolution Action (Doc. No.,. 62). The amended
4 Abstention Motion was denied on May 8, 2015, for the same reasons the court
5 denied the original Motion.

6 The operative pleading now before the court, the third amended complaint,
7 was filed on May 28, 2015 (Doc. No. 67; the “TAC”). The TAC appears to restate
8 only the claims arising under subsections (a)(5) and (a)(15). However, the TAC
9 also accuses the Debtor of extrinsic fraud (TAC ¶22) and the prayer for relief
10 again requests relief under (a)(6) for willful malicious injury. It pleads with
11 reference to both the Marvin Action and the Dissolution Action and attempts to
12 conflate those actions as one. The TAC is so poorly drafted that it is difficult for
13 the court to discern what facts Rodriguez actually alleges and what claims for
14 relief she is actually pursuing. For example, the TAC includes a “First Claim for
15 Relief” and a “Second Claim for Relief” which both list a “Count 1, Dissolution
16 Orders,” and a “Count 2, Petition for Support and Maintenance.” After discussion
17 at the continued status conference, the court took the matter under submission to
18 consider an appropriate disposition.

19 **Historical Background.**

20 This ruling is based upon facts as alleged in Rodriguez’s Initial Complaint
21 and the subsequent amended pleadings, as well as matters that appear in the record
22 which have been judicially noticed. *See United States v. Ritchie*, 342 F.3d 903,
23 908 (9th Cir. 2003) (allowing the court to consider matters properly subject to
24 judicial notice in a motion to dismiss). The court has also considered the
25 statements and arguments in the Abstention Motion, and the Marvin Action
26 background summary in the Appellate Opinion. However, this decision deals
27 solely with the sufficiency of Rodriguez’s pleadings in this adversary proceeding
28 and all factual allegations in those pleadings, as opposed to legal conclusions, must

1 be accepted as true. Accordingly, nothing in the discussion that follows constitutes
2 a finding of fact.

3 **Pre-Bankruptcy Events.** In 1990, Rodriguez and the Debtor entered into a
4 relationship in which “each agreed [*inter alia*] the parties would live together;
5 combine their skills, efforts, labors, and savings; and share any and all property
6 acquired and accumulated as a result of said skills, efforts, labor and earnings.”
7 (Initial Complaint pg. 2, lines 20-23.) The parties were subsequently married in
8 January 2005. However, the marital relationship ended in August 2006. (Initial
9 Complaint pg. 3, lines 2-8.) In September 2006, the Debtor filed a petition for
10 dissolution of the marriage in the Kern County Superior Court (the “Dissolution
11 Action”; discussed below). In February 2008, a judgment was entered in the
12 Dissolution Action in which the Debtor was ordered to, *inter alia*, pay spousal
13 support to the Debtor (the “Dissolution Judgment”). The Debtor has not
14 performed under the Dissolution Judgment and Rodriguez seeks relief to enforce
15 the terms of the Dissolution Judgment.

16 In response to the Dissolution Action, in November 2006, Rodriguez filed a
17 separate civil complaint against the Debtor, also in the Kern County Superior
18 Court. This civil action is referred to in the Dissolution Judgment as the “Marvin
19 Action.” (Discussed below.) The Marvin Action was dismissed by the state court
20 in May 2011, as a discovery sanction. Since then, it has been to the state court of
21 appeals twice as detailed more completely in the Appellate Opinion.⁶ On February
22 20, 2015, the court of appeals essentially vacated the state court’s dismissal order
23 and remanded the Marvin Action for further proceedings. The Marvin Action is
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26 ⁶In July 2011, Rodriguez filed a motion for relief from the dismissal order
27 pursuant to Cal. Code of Civil Procedure (“Cal. CCP”) 473. That motion was denied.
28 In February 2013, the Court of Appeal for the Fifth Appellate District affirmed the
dismissal order but remanded for further consideration of the § 473 motion for relief. In
August 2013, the trial court again denied the § 473 motion and Rodriguez again
appealed. That ruling was vacated in the Appellate Opinion.

1 still pending after remand from the Appellate Court, however further prosecution
2 of the Marvin Action is barred by virtue of the Debtor's chapter 7 discharge unless
3 and until this court finds that the claims therein are excepted from that discharge.

4 **The Bankruptcy.** The Debtor commenced this bankruptcy with the filing
5 of a chapter 7 petition in June 2014. The Debtor is an attorney, however his
6 income is reported on Schedule I to be \$0. Rodriguez is listed in schedule F with
7 an "unliquidated and disputed claim" in an unknown amount. The Debtor's
8 discharge was entered on November 3, 2014 (Main Case Doc. No. 19: the
9 "Discharge Order"). As a matter of law, entry of the discharge creates an
10 injunction against the prosecution of certain claims against the Debtor. § 554(a)(2).
11 The terms of the Discharge Order expressly identify the following debts to which
12 the discharge injunction does *not* apply: (1) debts that are domestic support
13 obligations, and (2) debts that the bankruptcy court specifically has decided or will
14 decide in the bankruptcy case are not discharged.

15 Rodriguez disputes the Debtor's characterization of her claims as
16 "unliquidated and disputed." Rodriguez filed a proof of unsecured claim in this
17 case in November 2014. She seeks to recover more than \$6.1 million for
18 "Domestic Support and Breach of Contract." The proof of claim designates
19 approximately \$5.5 million to be "Domestic Support" entitled to priority under
20 § 507(a)(1)(A) or (a)(1)(B). The proof of claim includes seven pages of text
21 summarizing the various incidents, events and transactions upon which the claim is
22 based.

23 The chapter 7 trustee completed his administration of the case and filed his
24 final report on June 26, 2015. (Main case Doc. No. 25; the "TFR"). The TFR
25 reports that the Trustee recovered some funds totaling \$8,273.14. After payment
26 of administrative expenses, all of the funds recovered in this case have been or will
27 be distributed to the Internal Revenue Service on account of a substantial secured
28 and/or priority claim. There are no funds to make any distribution to Rodriguez on

1 account of her unsecured claim.

2 **The State Court Litigation.**

3 To understand this dispute, it is first necessary to understand the
4 relationship between, and the substantive issues raised in, the Dissolution Action
5 and the Marvin Action. Both Actions were filed after the couple’s relationship
6 disintegrated in 2006. It is clear from the allegations in the TAC that Rodriguez
7 views the Marvin Action and the Dissolution Action as “related and interlocking.”
8 (TAC pg. 3, line 2.) However, the Federal Rules of Civil Procedure require that
9 claims be separately and clearly pled, and the theoretical relationship, if any,
10 between the pre- and post-marital claims, as stated in the two state court actions,
11 does not merge those claims for purposes of determining whether they were
12 discharged in this bankruptcy case. The Dissolution Action has already been
13 adjudicated and the state court has issued a Judgment in that Action. In contrast,
14 the Marvin Action has not been adjudicated and it was, at the commencement of
15 this bankruptcy, subject to a dismissal order and a pending appeal. As a matter of
16 law, Rodriguez could have petitioned the Family Court to consolidate the Marvin
17 Action with the Dissolution Action, but for some reason she elected not to do so.⁷

18 **The Dissolution Action and the Stipulated Judgment.** In or about
19 September 2006, the Debtor commenced the Dissolution Action by filing a petition
20 in the Kern County Superior Court (Case No. S-1501-FL-599166). The
21 Dissolution Action was contested and the state court held a trial in January 2008.
22 After the presentation of testimony, Rodriguez and the Debtor “entered into a
23 stipulation resolving all remaining issues before the court.” (“Dissolution
24 Judgment, attached pg. 1.) The Dissolution Judgment was entered in February
25

26 ⁷California law allows the consolidation of related matters pending before the
27 same court. Cal. CCP § 1048(a). The consolidation of disputes between spouses in the
28 Family Court is provided for in Cal. Family Code § 1101(f). Once the actions are
consolidated, the Family Court must decide both. *In re Marriage of Schenck*, 228
Cal.App.3d 1474, 1483-84 (1991).

1 2008; it formally terminated the marriage between Rodriguez and the Debtor, and
2 provided for spousal support in accordance with the parties' stipulation in open
3 court. The Dissolution Judgment also made detailed provisions for the division of
4 separate and community property.

5 With regard to the pending Marvin Action, the Dissolution Judgment made
6 two references. First, it preserved Rodriguez's right to "assert a claim for support
7 in said action":

8 The Respondent has filed a "Marvin Action" in the Kern
9 County Superior Court, Kern County Superior Court Case
10 Number S-1500-CV-259482-SPC. The below described
11 spousal support order shall not effect in any way said Marvin
12 Action and the *Respondent's right to assert a claim for
13 support in said action.*

14 Dissolution Judgement, attachment pg. 1, emphasis added.

15 Second, it preserved the Debtor's right to assert defenses in the Marvin
16 Action based on his agreement to pay certain tax obligations:

17 Petitioner's agreement to pay the 2004 Federal and State
18 Income Tax obligations however, shall not affect in any way
19 the Petitioner's right to have the trier of fact consider the
20 Petitioner's payment of said obligations as a defense or offset
21 in the Kern County Superior Court "Marvin Action" filed by
22 Respondent, Kern County Superior Court Case No. S-1500-
23 CV-259482-SPC.

24 Dissolution Judgment , attachment pg. 3.

25 In the TAC, Rodriguez alleges with regard to the Dissolution Action that
26 the Debtor has engaged in "fraud and ethical violations regarding . . . performance
27 of [the Debtor's] obligations to provide domestic support pursuant to the
28 Dissolution Orders. . . . [a]nd that the debtor has committed fraud on the court in
those proceedings." (TAC pg. 3-4, ¶11.)

The entire first claim for relief, entitled "Domestic Support Obligation," is
based on Rodriguez's contention that the Debtor has not properly performed in
compliance with the Dissolution Judgment. In the second claim for relief, entitled
"Divorce or Separation Obligation," Rodriguez appears to be asking this court to

1 (1) enforce the Dissolution Judgment, and (2) make a new award for support and
2 maintenance. “Plaintiff seeks a final judgment that will provide for Plaintiff’s
3 basic needs such as food and shelter by a court order in accordance with non
4 bankruptcy law.” (TAC pg. 7, ¶35.)

5 **The Marvin Action.** In response to the Dissolution Action, Rodriguez
6 filed a complaint against the Debtor in the Kern County Superior Court on
7 November 2, 2006 (Case No. S-1500-CV-259482). This is the litigation referred
8 to in the Dissolution Judgment as a “Marvin Action.” In the TAC, Rodriguez
9 refers to the Marvin Action as a “Petition for Support and Maintenance.” (TAC
10 pg. 2, ¶s 7 & 8.) However, the Marvin Action arises from the parties’ relationship
11 *before* they were married and appears to be in the nature of a palimony suit.

12 In the Marvin Action, Rodriguez asserts eight causes of action against the
13 Debtor on various theories including breach of contract (express and implied),
14 quantum merit, declaratory relief, misrepresentation (intentional and negligent)
15 concealment. The Marvin Action appears to relate back entirely to a period of
16 time between 1990 and 2006 when Rodriguez and the Debtor lived together and
17 allegedly “agreed to” combine their skills, efforts, labor and earnings and would
18 share any and all property and accumulated as a result of said skills, efforts, labor
19 and earnings.” (Marvin Action, pg. 3: lines 1-3.) The prayer for relief in the
20 Marvin Action requests damages according to proof (compensatory and punitive)
21 and declaratory relief.

22 **Issues Presented.**

23 The immediate issue before the court is whether the allegations in the TAC
24 satisfy the federal pleading standards and show, in a short plain statement, that
25 Rodriguez has one or more plausible claims against the Debtor. Since Rodriguez
26 seeks relief to continue her prosecution of both the Dissolution Action and the
27 Marvin Action, the court will consider both of those actions separately. Because
28 the TAC also makes vague references to fraud and willful injury, the court will

1 address the sufficiency of the pleadings with regard to those claims as well.

2 **The Federal Pleading Standard.**

3 This discussion begins with reference to Federal Rules of Civil Procedure
4 (“FRCP”) 8 and 9.⁸ FRCP 8(a)(2) provides that “A pleading that states a claim for
5 relief must contain a short plain statement of the claim showing that the pleader is
6 entitled to relief.” With regard to fraud claims, FRCP 9(b) requires that the
7 circumstances constituting fraud or mistake to be plead “with particularity.”

8 In 2007, the U.S. Supreme Court stepped in to further clarify the rules for
9 pleading a claim in federal court and effectively abolished the old “notice
10 pleading” standard. The pleadings must contain enough factual allegations to
11 establish a “plausible” claim. Under current federal pleading practice, the
12 plaintiff’s “entitle[ment] to relief” requires more than labels and conclusions, and
13 a formulaic recitation of the elements of a cause of action will not do” *Bell*
14 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The court has
15 an affirmative obligation to review the underlying factual allegations and
16 supporting evidence to make sure the plaintiff has pleaded and can prove its *prima*
17 *facie* case. The bankruptcy court cannot accept as true any legal conclusions
18 couched as factual allegations. *See Twombly*, 550 U.S. at 555 (citing *Papasan v.*
19 *Allain*, 478 U.S. 265, 286 (1986)).

20 The potential for abuse in the filing of dischargeability complaints, together
21 with the more rigid pleading standards now applicable in the federal courts,
22 underscore the importance of judicial scrutiny of a complaint filed against debtors
23 who often cannot defend themselves. *See AT&T Universal Card Servs. Corp. v.*
24 *Grayson (In re Grayson)*, 199 B.R. 397, 403 (Bankr. W.D. Mo. 1996). That
25 tension was thoughtfully considered by one court in a recent unpublished opinion:
26

27
28 ⁸Both have been incorporated into the Federal Rules of Bankruptcy Procedure
for application to this adversary proceeding (FRBP 7008 and 7009).

1 A debtor who files leaves all non-exempt assets with a trustee, and seeks to
2 emerge with only his future income, his exempt assets, and a discharge
3 from personal liability. If that debtor is sued by a creditor claiming its debt
4 cannot be discharged, the choice is either to fight the charge, though lacking
5 the resources to pay a lawyer to do so, or simply to settle with the creditor,
6 often agreeing to reaffirm the debt. And this is motivated often by the
7 simple fact that the debtor cannot afford the fight—never mind whether the
8 allegations are well taken or not. . . . It is thus important to apply the
9 *Twombly* standard rigorously to these sorts of complaints.

10 *FIA Card Servs. v. Travis (In re Travis)*, No. 10-5118-C, 2011 WL 1334387, at *2
11 (Bankr. W.D. Tex. Apr. 7, 2011) (citing *In re Grayson*, 199 B.R. at 403) (citations
12 omitted) (emphasis in original).

13 Determining whether a complaint states a plausible claim for relief is a
14 context-specific task that requires the court to draw on its judicial experience and
15 common sense. But where the well-pleaded facts do not permit the court to infer
16 more than the mere possibility of misconduct, the complaint has alleged—but it
17 has not “show[n]”—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc.
18 8(a)(2). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citations omitted).

19 **Analysis and Conclusions of Law.**

20 **The Dissolution Action Claims Were Not Discharged.** Rodriguez seeks
21 relief to pursue available remedies and to enforce the terms of the Dissolution
22 Judgment in the state court. The analysis of this issue begins with reference to §
23 523(a)(5) which states, in pertinent part:

24 (a) A discharge under section 727 . . . of this title does not discharge an
25 individual debtor from any debt—

26 . . .

27 (5) for a domestic support obligation.

28 The term “domestic support obligation” is defined in § 101(14A) of the
Bankruptcy Code. It essentially means Rodriguez’s right, as the Debtor’s former
spouse, to receive alimony, maintenance, and support as provided for in the
Dissolution Judgment.⁹

⁹Section 101(14A) defines a “domestic support obligation” in pertinent part as follows:

14(a) The term "domestic support obligation" means a debt that accrues

1 To the extent that the Debtor has not performed his obligations under the
2 Dissolution Judgment relating to matters other than the payment of “alimony,
3 maintenance, or support,” Rodriguez is entitled to relief under § 523 (a)(15) which
4 excepts from discharge certain other obligations between, *inter alia*, spouses or
5 former spouses arising from the marital relationship.¹⁰

6 Here, there is no dispute that Rodriguez has a right to enforce the
7 Dissolution Judgment. However, the bankruptcy court is not the forum for that
8 proceeding: Rodriguez must return to the state court to enforce the Dissolution
9 Judgment and any other orders entered in the Dissolution Action. Rodriguez’s
10 right to receive alimony, support and maintenance arising from her role as the
11 Debtor’s spouse is excepted from the chapter 7 discharge as a matter of law

12 _____
13 before, on, or after the date of the order for relief in a case under this title, including
14 interest that accrues on that debt as provided under applicable nonbankruptcy law
notwithstanding any other provision of this title, that is—

15 (A) owed to or recoverable by—

16 (i) a spouse, former spouse, or child of the debtor or

17 . . .

18 (B) in the nature of alimony, maintenance, or support (including
19 assistance provided by a governmental unit) of such spouse, former spouse, or child of
the debtor . . .

20 [and] . . .

21 (C) established or subject to establishment before, on, or after the date of
the order for relief in a case under this title, by reason of applicable provisions of—

22 (i) a separation agreement, divorce decree, or property settlement
23 agreement; [or]

24 (ii) an order of a court of record; . . .

25 ¹⁰ Section 523(a)(15) provides in pertinent part:

26 (15) to a spouse, former spouse, or child of the debtor and not of the kind
27 described in paragraph (5) that is incurred by the debtor in the course of a
28 divorce or separation or in connection with a separation agreement,
divorce decree or other order of a court of record, or a determination made
in accordance with State or territorial law by a governmental unit;

1 pursuant to § 523(a)(5). There is no dispute that the Dissolution Judgement
2 includes a support award. Indeed the parties stipulated to that relief in the state
3 court before the Dissolution Judgment was entered. Similarly, Rodriguez has a
4 right to enforce other provisions of the Dissolution Judgment, such as the property
5 division terms, to which the parties stipulated. That part of the Dissolution
6 judgment appears to be excepted from discharge pursuant to 523(a)(15). Neither
7 party has made any showing otherwise.

8 With regard to the Dissolution Action, and the Dissolution Judgment,
9 Rodriguez has not pled a claim that shows there is any dispute for this court to
10 adjudicate. If, as alleged, the Debtor has not performed the obligations to which
11 he stipulated in the Dissolution Judgment, then the state court is the court with
12 proper jurisdiction to remedy that problem. If there is now reason to modify the
13 Dissolution Judgment, it would be a state law issue and that relief must be
14 requested in the state court. If, as alleged, the Debtor has committed a “fraud on
15 the court” in conjunction with the Dissolution Action, the state court is the place to
16 present that argument.

17 **The Marvin Action and § 523(a)(15).** Rodriguez also seeks relief to
18 continue prosecuting the Marvin Action in the state court. Unfortunately for her,
19 the claims she asserts in the Marvin Action arise under state contract and tort law.
20 The parties were not married at the time those claims arose and, therefore, those
21 claims do not fall within the scope of “alimony, maintenance and support”
22 protected by § 523(a)(5). The court has never entered an order adjudicating the
23 Marvin Action claims; they are not protected by § 523(a)(5).

24 The fact that a litigant has a “Marvin Action” claim does not implicate any
25 special body of law or make the Family Code apply in such cases. Rather, it only
26 describes the circumstances of a dispute, the fact that it has arisen between two
27 persons, not married to one another, who are or have co-habitated.

28 The case in *Marvin* concerned a couple which had co-habitated for for

1 seven years without marriage. When the couple separated the woman sued to
2 enforce an oral contract between the parties that provided that all of the property
3 that had been acquired during those years, taken in the man’s name, should be split
4 between them, and to support payments. In the appeal to the California Supreme
5 Court the oral agreement was held binding as an express contract that did not rely
6 solely on meretricious consideration. *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

7 Ten years after the *Marvin* decision the Ninth Circuit Bankruptcy Appellate
8 Panel had occasion to interpret the effect of *Marvin* in a § 523 dischargability
9 proceeding. In *Niermeyer v. Doyle (In re Doyle)* 70 B.R. 106, 108 (9th B.A.P.
10 1986), the court declined the creditor’s invitation to extend *Marvin*, interpreting
11 the holding in *Marvin* as implying “that any obligation owing to the non-married
12 partner arises from contractual obligations and not from an inherent right to such
13 obligation. It expressly provides that unmarried parties do not have rights under
14 the Family Law Act.”¹¹ *Id.* The *Niermeyer* court went on to explain, “It is clear
15 from the cases that alimony arises from the relationship of marriage. *It is not*
16 *based on a business transaction but it arises from the legal duty* of [spouses to
17 support one another].” *Id.*, 109, emphasis added.

18 In *Marvin* the California Supreme Court summarized the state of the law
19 and concluded that the right of unmarried co-habitants to enforce express and
20 implied contracts was not impaired by reason of their cohabitation. *Id.* 116. The
21 *Marvin* court listed multiple possible causes of action which such parties might
22 pursue, including breach of express or implied contract, equitable remedies such as
23 constructive and resulting trusts, and *quantum meruit* (“We need not treat
24 nonmarital partners as putatively married persons in order to apply principles of
25 implied contract, or extend equitable remedies; we need to treat them only as we
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27 ¹¹The California Family Code has superseded the Family Law Act without
28 substantive change.” *In re Marriage of Eustice*, 242 Cal.App.4th 1291 (Cal.App. 4th
Dist. 2015).

1 do any other unmarried persons.”). *Id.* 118. None of the claims cited by the court
2 were based on the Family Law Act.

3 The *Marvin* court drew a distinction between adjudication of disputes
4 between married persons, in which the Family Code applies, and those governed
5 by general statutes and common law. While the Family Code is applied to
6 relationships between putative spouses, where at least one party has been led to
7 believe they are legally married,¹² enforcing the Family Code on those choosing to
8 live as unmarried co-habitants could “frustrate” the parties’ expectations. *Id.*, n.
9 18. To the contrary, it concluded that “such a relationship remains subject solely
10 to judicial decision,” and not to the provisions of the Family Law Act.

11 No language in the Family Law Act addresses the property rights of
12 nonmarital partners, and nothing in the legislative history of the act
13 suggests that the Legislature considered that subject. The delineation
14 of the rights of nonmarital partners before 1970 had been fixed
15 entirely by judicial decision; we see no reason to believe that the
16 Legislature, by enacting the Family Law Act, intended to change that
17 state of affairs.

18 *Id.* 681.

19 *Marvin* makes it clear that the Family Code does not apply to Rodriguez’s *Marvin*
20 Action; the same common and statutory law that applies to other unmarried
21 persons governs this dispute.

22 Rodriguez also contends that her *Marvin* Action claims should be excepted
23 from discharge pursuant to § 523(a)(15); the court disagrees on the grounds that
24 § 523(a)(15) does not apply to the claims of an unmarried person against a debtor
25 in bankruptcy. Since *Marvin* was decided so-called palimony claims have become
26 common in other states. As a court in New Jersey noted in an unpublished

27 ¹²“While so-called common-law marriage is not recognized California, the
28 Family Code does provide for “putative marriages,” in which at least one party has been
led to believe they are legally married. In such cases property of the relationship is
defined as “quasi-marital property” and is subject to the provisions of the Family
Code.” *Marvin v. Marvin*, 557 P.Rptr. 2d 106, 118, 134 Cal.Rptr. 815 (Cal. 1976).

1 opinion, these judgments

2 have been part of the common law since 1976. However, when the
3 Bankruptcy Code was amended in 2005, Congress did not add these
4 judgments to the list of non-dischargeable debts. When section
5 523(a)(15) was amended in 2005, the language “owed to a spouse,
6 former spouse or child of the debtor” was added. The court has no
7 choice but to make the determination that the Plaintiff and the
8 Debtor were never legally married under the law of New Jersey and
9 the Plaintiff, therefore, cannot be considered a former spouse of the
10 debtor. Section 523(a)(15) is clear that to be non-dischargeable, a
11 debt must be owed to a spouse or former spouse, which the Plaintiff
12 is not.

13 *In re Bakkar*, 2009 WL 3068192, *4 (D.N.J. 2009), citations omitted, emphasis
14 added.

15 A close analysis of § 523(a)(15) belies Rodriguez’s contention that it
16 excepts her Marvin Claims from Brill’s discharge. That section, parsed as to the
17 relevant provisions, reads:

18 “A discharge under section 727 . . . does not discharge an individual debtor
19 from **any debt--to a . . . former spouse . . .** and not [a 523(a)(5) Domestic
20 Support Order] that is **incurred by the debtor**
21 in the *course of* a divorce
22 or separation,
23 or *in connection with*
24 a separation agreement,
25 or **other order of a court of record**,
26 or a determination made in accordance with State or
27 territorial law by a governmental unit.”

28 The court concludes that, while § 523(a)(15) *might* apply to a Marvin Action
judgment in this case, it has no application to a such an inchoate or pending cause
of action.

Clearly, the statute excepts from discharge some debts owed by a debtor to
a spouse or former spouse under a variety of circumstances. If such a debt is
incurred by the debtor, to the former spouse, in the course of a divorce or

1 separation agreement then it is excepted from discharge. If a debt to a former
2 spouse is incurred in connection with a separation agreement, it is excepted from
3 discharge. And, if a debt to a former spouse is incurred in connection with an
4 “other order of a court of record,” such as would be in the case of a Marvin Action
5 *judgment*, it would be excepted from discharge. Here, however, Rodriguez has no
6 “other order of a court of record” memorializing a Marvin Action *judgment*.
7 Instead, she simply has a contract claim against the debtor that is based on his
8 alleged breach of an express or implied agreement. In the absence of a showing of
9 fraud, contract claims are discharged.

10 The Ninth Circuit BAP, in the unpublished decision, *Adam v. Dobbin (In re*
11 *Adam)*, 2015 WL 1530086, *3 (9th Cir. BAP April 6, 2015), very recently
12 addressed § 523(a)(15) in connection with a civil claim against a debtor by a
13 spouse/former spouse. The BAP affirmed the bankruptcy court's decision that an
14 award for attorneys fees, attributable in part to a civil action brought by a
15 spouse/former spouse against the debtor, was excepted from discharge under
16 523(a)(15). On appeal the BAP wrote,

17 The bankruptcy court heard the second round of summary
18 judgment motions on April 10, 2014. The court expressed concern
19 about deeming civil claims, made in connection with a family law
20 action *that had nothing to do with the marriage dissolution other*
21 *than the fact that there were two spouses involved*, excepted from
22 discharge under § 523(a)(15). However, after taking the motions
23 under submission, on April 14, 2014, the court ruled:

24 "The attorney fee award of \$300,000 under the Amended
25 Judgment was incurred by Adam in the course of the marriage
26 dissolution between Adam and Dobin, and the sum of \$300,000, less
27 the credit of \$6,242 remained owing by Adam to Dobin on the
28 petition date. It is accordingly ORDERED that [Dobin's] motion for
summary judgment is granted, and the balance of the \$293,758
owing on the attorney fee award under the Amended Judgment is
nondischargeable under 11 U.S.C. § 523(a)(15)."

1 *Id.*, at *4, emphasis added.

2 The BAP, in its decision affirming the bankruptcy court, relied on the fact
3 that, in its award, the state court had lumped together the attorneys fees for the
4 civil action and for the dissolution action. In our case, the Dissolution Action and
5 the Marvin Action were not merged in any way but are distinct litigation actions.
6 However, more importantly, in *Adam* the spouse/former spouse already held an
7 “order of a court of record” when the debtor’s bankruptcy case was filed. In
8 contrast here, at the time Brill filed his bankruptcy petition, Rodriguez possessed
9 only a *right to pursue litigation* that potentially could have resulted in a civil
10 judgment for breach of contract. Under § 523(a)(15) an award in the Marvin
11 Action might have been excepted from Brill’s discharge, being one 1) incurred by
12 the debtor; 2) to a former spouse; 3) not a domestic support order; 4) in connection
13 with an order of a court. However, Rodriguez does not hold such a judgment and
14 any further litigation in furtherance of her breach of contract action is enjoined by
15 Brill’s discharge injunction.

16 **“Fraud” Exception to Discharge under § 523(a)(2)(A).** To balance the
17 fresh start afforded to “honest but unfortunate” debtors through a discharge of
18 debts, the Bankruptcy Code excepts from discharge any debt “for money, property,
19 services, or an extension, renewal, or refinancing of credit, to the extent obtained
20 by . . . false pretenses, a false representation, or *actual fraud*.” § 523(a)(2)(A)
21 (emphasis added). To prove actual fraud, a creditor must establish each of the
22 following five elements: (1) that the debtor made false representations; (2) that at
23 the time he knew they were false; (3) that he made them with the intention and
24 purpose of deceiving the creditor; (4) that the creditor relied on such
25 representations; and (5) that the creditor sustained the alleged loss and damage as
26 the proximate result of the representations having been made. *Citibank (S.D.),*
27 *N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086 (9th Cir. 1996). These five
28 elements mirror those of common law fraud. *See Field v Mans*, 516 U.S. 59, 69

1 (1995). In the nondischargeability action, the creditor must prove these elements
2 by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286
3 (1991).

4 **The “Willful and Malicious Injury” Exception to Discharge under**
5 **§ 523(a)(6).** Rodriguez appears to contend that she has been injured by the
6 Debtor’s willful and malicious conduct. To prevail, Rodriguez would have to
7 properly plead and prove that claim pursuant to § 523(a)(6). Section 523(a)(6)
8 applies to those debts which arise from willful and malicious injuries by the debtor
9 to persons or property. The plaintiff bears the burden of proof, and the two
10 elements, willfulness and malice, must be plead separately. *Albarran v. New*
11 *Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008). As the Supreme
12 Court explained the first element of a § 523(a)(6) claim in *Kawaauha v. Geiger*,
13 523 U.S. 57, 61, 118 S.Ct. 974 (1998), “[t]he word ‘willful’ in (a)(6) modifies the
14 word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional
15 *injury*, not merely a deliberate or intentional *act* that leads to injury.” (Emphasis in
16 original.) This does not include injuries which are neither desired nor anticipated
17 by the debtor. *Id.* The “willful injury requirement is met only when the debtor has
18 a subjective motive to inflict injury or when the debtor believes that injury is
19 substantially certain to result from his own conduct.” *In re Ormsby*, 591 F.3d
20 1199, 1206 (9th Cir. 2010) (citation omitted).

21 In order to plead the “malice” element of § 523 (a)(6) claim, the plaintiff
22 must include facts to show that it is plausible that plaintiff’s injuries were the result
23 of, “(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury,
24 and (4) is done without just cause or excuse.” *Ormsby*, 591 F.3d at 1207. Here, the
25 TAC is utterly devoid of any factual allegations to support a plausible claim under
26 § 523(a)6).

27 **Dismissal with Prejudice.** Civil Rule 15(a)(2), incorporated by FRBP
28 7015, permits amendment of Rodriguez’s pleadings only with the Debtor’s consent

1 or leave of the court. Such leave to amend “should freely” be given “when justice
2 so requires.” *Id.* However, “liberality in granting leave to amend is subject to
3 several limitations.” *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160
4 (9th Cir. 1987). For example, where amendment would cause the defendant undue
5 prejudice, would be futile, or create undue delay, leave need not be granted. This
6 is especially true where the complaint has been previously amended.

7 The question here is whether Rodriguez should be given a further
8 opportunity to plead a claim that plausibly fits within one of the subdivisions of
9 § 523. The court has already dismissed this adversary proceeding three times,
10 shared with Rodriguez’s counsel its concerns with regard to her various pleadings
11 and theories, and instructed Rodriguez’s counsel of the need for more facts. The
12 court must assume at this point that the TAC represents Rodriguez’s best effort at
13 pleading plausible claims and that any further amendment would be futile. Further
14 amendment would prejudice the Debtor and cause undue delay.

15 **Conclusion.**

16 The entire TAC is dismissed with prejudice. The complaint fails to plead a
17 claim for relief for fraud. It also appears that an adversary proceeding is not
18 necessary for relief under § 523(a)(5) nor for appropriate relief pursuant to §
19 523(a)(15). And, for the reasons set forth above, Rodriguez’s state law contract
20 and tort claims pursuant to *Marvin v. Marvin* are not excepted from Brill’s
21 discharge. Based on the foregoing,

22 IT IS HEREBY ORDERED that this adversary proceeding is DISMISSED
23 with prejudice as to any Tort Claims which Rodriguez asserts under § 523
24 subsections (a)(2) and (a)(6). The adversary proceeding is also dismissed with
25 prejudice as to the claims Rodriguez asserts in the Marvin Action (State Court
26 Case No. S-1500-CV-259482). The Marvin Action claims based on various
27 theories in contract and tort arise outside of the parties’ marriage and have been
28 discharged in this chapter 7 bankruptcy.

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The adversary proceeding is DISMISSED without prejudice as to any domestic support obligation claims which Rodriguez may need to pursue in the State Court in the Dissolution Action within the meaning of § 101(14a), and any claims which Rodriguez may need to pursue in the Dissolution Action within the meaning of § 523(a)(15). With regard to § 523(a)(5) and (a)(15) claims, Rodriguez’s rights to enforce the Debtor’s domestic support obligations and any orders or agreements entered in the course of “a divorce or separation” are excepted from discharge as a matter of law, without the need for an order from this court. Rodriguez has not plead sufficient facts to show that there is a bona fide dispute for this court to decide. If Rodriguez needs to return to this court for relief with regard to the application of § 523 subsections (a)(5) and (a)(15), she must separately plead those claims with facts sufficient to show that there is a dispute and that she is entitled to relief. The parties shall bear their own costs and attorney fees.

Dated: January 28, 2016

/s/ W. Richard Lee
W. Richard Lee
United States Bankruptcy Judge