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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 13-10603-B-7
Omar Ali Enriguez,)	
Debtor.)	
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Wencelao Heredia,)	Adversary Proc. No. 13-1049
Plaintiff,)	DC No. DRJ-3
v.)	
Omar Ali Enriguez,)	
Defendant.)	
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**MEMORANDUM DECISION REGARDING
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

David R. Jenkins, Esq., appeared on behalf of the debtor/defendant, Omar Ali Enriguez.

Gabriel J. Waddell, Esq., of the Law Offices of Peter L. Fear, appeared on behalf of the plaintiff, Wencelao Heredia.

Before the court is a motion (the "Motion"), filed by the debtor/defendant, Omar Ali Enriguez (the "Debtor"), to dismiss this adversary proceeding, which was filed to determine the dischargeability of a debt for personal injury owed to the plaintiff, Wencelao Heredia ("Heredia"). This adversary proceeding has already been dismissed twice based on insufficient factual allegations to support a claim for relief. The Debtor now requests that dismissal be with prejudice. For the reasons set forth below, the Motion will be granted.

1 For purposes of this motion, the court must accept as true the factual
2 allegations pled in the complaint, therefore no findings of fact are necessary
3 or appropriate. The court has also taken judicial notice of matters in the
4 record that may be relevant to this decision. This memorandum decision
5 contains the court's conclusions of law. The court has jurisdiction over this
6 matter under 28 U.S.C. § 1334 and 11 U.S.C. § 523¹ and General Orders
7 182 and 330 of the U.S. District Court for the Eastern District of California.
8 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

9 **Background.**

10 Heredia and the Debtor are neighbors in a semi-rural area of Fresno,²
11 and nothing has been pled in this adversary proceeding to suggest that they
12 did not enjoy an amicable relationship. This adversary proceeding arises
13 from an incident that occurred on April 9, 2012. While working in his yard,
14 Heredia was attacked by three pitbull dogs which had escaped from the
15 Debtor's yard. The basic facts of the incident are undisputed. In summary,
16 the dogs got out of an enclosed area behind the Debtor's house and crawled
17 under a poorly maintained chain link fence surrounding the Debtor's

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20 ¹Unless otherwise indicated, all chapter, section and rule references are to
21 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of
22 Bankruptcy 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.

23 ²Attached to the Complaint as Exhibit 6 is a copy of a five-page report
24 prepared by the Fresno Animal Control officer who first investigated the incident
25 on April 9, 2012 (the "Animal Control Report"). Although the Animal Control
26 Report by itself would be inadmissible hearsay, Heredia has offered it into
27 evidence to help establish the background facts and the Debtor's state of mind.
28 The Animal Control Report reveals that the area where the parties live is sparsely
populated. The Debtor's house sits on a one-acre parcel surrounded by a chain
link fence. Heredia's house is separated from the Debtor's house by a pasture and
a road that leads to the property behind the houses. The Complaint at paragraph
11 suggests that the area is suitable for boarding horses.

1 property. The dogs then crawled under another fence to enter Heredia's
2 back yard where he has working in the garden. The dogs attacked and
3 Heredia was severely injured. When the Debtor first heard the commotion,
4 he tried unsuccessfully to prevent the dogs from entering Heredia's yard.
5 After the attack, the Debtor drove Heredia to the hospital for treatment.
6 The dogs were later euthanized by the Fresno County Animal Control.
7 Heredia subsequently filed a civil suit for recovery of unspecified damages
8 against the Debtor in the Fresno County Superior Court (the "PI Claim").³

9 On January 30, 2013, the Debtor filed a petition under chapter 7.
10 The schedules list assets worth approximately \$71,000, secured claims
11 totaling approximately \$68,000 and unsecured claims, exclusive of
12 Heredia's PI Claim, of approximately \$10,000. The Debtor's schedule F
13 listed Heredia as an unsecured creditor holding a claim described as, "Civil
14 Suit," and valued at, "Unknown." The Debtor's Statement of Financial
15 Affairs disclosed the PI Claim under "Suits and administrative
16 proceedings."

17 Heredia commenced this adversary proceeding on April 29, 2013,
18 seeking to except the PI Claim from the chapter 7 discharge pursuant to
19 § 523(a)(6) (willful and malicious injury). The court granted the Debtor's
20 motion to dismiss the initial complaint based on the need for additional
21 facts to support the claim. Heredia filed an amended complaint, which
22 drew from the Debtor another successful motion to dismiss for essentially
23 the same reason. The court allowed Heredia to file a second amended
24 complaint (the "Complaint") to which this memorandum relates.

25 The Debtor again moves to dismiss the Complaint under Federal

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27 ³The Complaint requests a jury trial and an award of damages "to be
28 determined at trial." At oral argument, Heredia's counsel stated that Heredia had
incurred approximately \$160,000 in medical bills. He did not know what Heredia
would request for pain and suffering.

1 Rule of Civil Procedure 12(b)(6) (made applicable to this adversary
2 proceeding by Federal Rule of Bankruptcy Procedure 7012) and the
3 pleading standard established by the Supreme Court in *Bell Atl. Corp. v.*
4 *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and
5 subsequently in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173
6 L.Ed.2d 868 (2009). The Debtor contends that the Complaint does not
7 allege facts sufficient to lead the court to conclude that it is plausible that
8 the Debtor had either a “subjective intent to harm” Heredia or a “subjective
9 belief that harm was substantially certain.” *In re Su*, 290 F.3d 1140, 1143
10 (9th Cir.2002).⁴

11 **Factual Allegations.**

12 The Complaint pleads one claim for relief pursuant to § 523(a)(6).

13 The relevant facts as alleged in the complaint are summarized as follows:

- 14 1. The Debtor owned three adult pitbull dogs which were kept
15 on his property.
- 16 2. In September 2011, a dog belonging to the Debtor’s
17 girlfriend, and kept at the same address, physically “bit” a
18 third party resulting in a complaint to the Fresno Animal
19 Control department. The dog was relinquished and
20 euthanized after the incident.
- 21 3. January 4, 2012, a resident of the neighborhood complained
22 to Animal Control about two black and white pitbull dogs
23 wandering loose in the area and “menacing neighbors.” The
neighbor reported to the Animal Control officer that “she was
told by neighborhood kids” that the dogs “had killed some
cats and chased a horse.” Animal Control investigated the
incident, contacted the Debtor’s brother at the property and
left a written warning for the Debtor. The Animal Control
Report stated “[t]here were no violations observed” with
regard to this prior incident.

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27 ⁴At oral argument, Heredia’s counsel conceded that the Debtor did not
28 have a subjective intent to injure Heredia. Based thereon, all of the discussion in
this memorandum will be focused on the “substantial certainty of harm’ question.

- 1 4. On March 29, 2012, a neighbor complained to Animal
2 Control about three black and white pitbull dogs that "charged
3 her, chasing her into her house." The dogs did not physically
4 attack the neighbor. Animal Control issued a verbal and
5 written warning to the Debtor.
- 6 5. The Debtor's dogs were kept in an area surrounded by a chain
7 link fence that was not properly maintained and inadequate to
8 prevent them from leaving his property.
- 9 6. On April 9, 2012, while Heredia was gardening in his
10 backyard, the Debtor's dogs escaped from their enclosed yard
11 and crawled under Heredia's fence where they physically
12 attacked and severely injured him in the neck, ear, hand,
13 thigh, left leg and ankle. Surgery was required to repair some
14 of the damage and Heredia remains under a doctor's care.

10 **Issues Presented.**

11 Whether the Complaint pleads facts sufficient to support a
12 "plausible" claim for relief under § 523(a)(6) and, if not, whether Heredia
13 should be granted leave to amend the complaint a third time.

14 **Analysis and Conclusions of Law.**

15 Bankruptcy relief is afforded to the honest but unfortunate debtor.
16 Exceptions from discharge are construed narrowly and generally represent
17 social policy in the allocation of liability. For example, claims for injuries
18 under certain specific conditions, such as those that result when a debtor is
19 driving under the influence, are *per se* non dischargeable. § 523(a)(9).
20 However, other exceptions to discharge are limited to circumstances where
21 the debtor possesses some moral culpability and require some level of
22 scienter.

23 **Willful and Malicious Injury.** Section 523(a)(6) excepts from
24 discharge those debts which arise from willful and malicious injuries by the
25 debtor to persons or property. The plaintiff bears the burden of proof, and
26 the two elements, willfulness and malice, must be pled separately.

27 *Albarran v. New Form. Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th
28 Cir.2008).

1 As the Supreme Court explained the first element, in *Kawaauhau v.*
2 *Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974 (1998), “The word “willful” in
3 (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a
4 deliberate or intentional injury, not merely a deliberate or intentional act
5 that leads to injury.” This does not include injuries which are neither
6 desired nor anticipated by the debtor. *Id.* The “willful injury requirement is
7 met only when the debtor has a subjective motive to inflict injury or when
8 the debtor believes that injury is substantially certain to result from his own
9 conduct.” *In re Ormsby*, 591 F.3d 1199, 1206 (C.A.9, 2010), citing
10 *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir.2002).

11 In order to plead the “malice” element of § 523 (a)(6) claim, the
12 plaintiff must include facts to show that it is plausible that plaintiff’s
13 injuries were the result of, “(1) a wrongful act, (2) done intentionally, (3)
14 which necessarily causes injury, and (4) is done without just cause or
15 excuse.” *Id.* at 1207.

16 **Rule 12(b)(6) and the Twombly/Iqbal Pleading Standards.** The
17 Ninth Circuit examined the relevant case law, in *Starr v. Baca*, 652 F.3d
18 1202, 1215 (9th Cir. 2011), and succinctly defined the federal pleading
19 requirements under FRCP 12(b)(6) and *Twombly/Iqbal* as follows:

20 [W]e can at least state the following two principles common
21 to all of [the cases]. First, to be entitled to the presumption of
22 truth, allegations in a complaint or counterclaim may not
23 simply recite the elements of a cause of action, but must
24 contain sufficient allegations of underlying facts to give fair
25 notice and to enable the opposing party to defend itself
effectively. Second, the factual allegations that are taken as
true must plausibly suggest an entitlement to relief, such that
it is not unfair to require the opposing party to be subjected to
the expense of discovery and continued litigation.

26 Here, the question before the court is whether the Complaint avers
27 sufficient facts to show plausibly that Heredia’s injury was “substantially
28 certain to result” from the Debtor’s conduct. (*See* footnote 4, *supra.*) In the

1 context of the Complaint, the Debtor's conduct was the failure to maintain a
2 safe and appropriate enclosure for his three pitbull dogs, even after the prior
3 "incidents" and the "warnings" he received from the Animal Control
4 Department.

5 Second, the Complaint must aver facts that plausibly show this
6 conduct was the result of malice. While the Complaint addresses the
7 woeful condition of the dogs' enclosure at length, it does not offer any facts
8 upon which the court could conclude that these deficiencies were the result
9 of any malice toward Heredia. Neither do the facts alleged suggest that the
10 Debtor believed with substantial certainty that Heredia, or anyone else,
11 would be injured as a result of his failure to maintain the dog's enclosure
12 and the fence around his yard. The fact that the Debtor had recently
13 surrendered a different dog for euthanasia after a prior "incident" would
14 suggest that he did not believe the dogs were substantially certain to injure
15 anyone. Why would the Debtor not be more diligent in maintaining his
16 fence if he was substantially certain the dogs would be euthanized as a
17 result?

18 In the case, *In re Jercich*, 238 F.3d 1202 (C.A.9,2001), the debtor
19 failed to pay wages that were due his employee. The Ninth Circuit held the
20 employee's claim excepted from the debtor's discharge pursuant to
21 § 523(a)(6) based on a showing that the debtor knew that he owed the
22 wages, it was a violation of state law not to pay the wages, economic injury
23 to the employee was substantially certain to occur if the wages were not
24 paid, and that the debtor had no excuse for not complying with the law.
25 The court found that the debtor had the ability to pay the wages but simply
26 chose not to, spending the money instead on personal investments. There
27 was a direct and immediate connection between the debtor's legal duty to
28 pay wages to his employee and the economic harm that resulted from

1 debtor's election not to do so.

2 Here, there is no such direct connection. The dogs had allegedly
3 "chased" a neighbor and perhaps frightened some neighbors from time to
4 time, but they had never physically attacked anybody. The dogs had to
5 crawl under two chain link fences to reach Heredia. There is no allegation
6 that the dogs had ever previously entered someone else's back yard.

7 Two unpublished cases illustrate the distinction between when a
8 claim for personal injury caused by dogs, might and might not, be
9 dischargeable. *Jones v. Holmes (In re Holmes)*, AP No. 11-00391, 2012
10 WL 2359909 (Bankr. N.D. Ala., June 21, 2012), the court ruled in favor of
11 the debtor. The debtor operated a junkyard and his dogs had access,
12 through an open doorway, to the customer area of the shop where the
13 plaintiff was severely injured. This was at least the third "attack" incident
14 by the same dogs under similar circumstances, however the court said the
15 debtor did not leave the door open with the intent to injure anyone, and that
16 leaving the door open was not substantially certain to result in the injury,
17 even though this had happened in the past. "The dogs had on at least one
18 occasion run through the open door and attacked someone else, thus [the
19 debtor] should have been aware the dogs could possibly do the same again.
20 However, possibly and substantially certain are not the same." *Id.* at *7.
21 The court pointed out that many customers had come into the shop between
22 the two incidents. "[O]ne or two prior attacks does not equate to substantial
23 certainty that the dogs would attack any time the door was left open."
24 Distinguishing the case from the circumstances in *Zauper v. Lababit (In re*
25 *Lababit)*, AP No. 07-01227, 2009 WL 7751426 (9th Cir. BAP Oct. 8,
26 2009), the court said that reckless disregard or negligence did not satisfy
27 § 523(a)(6).

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1 In *Lababit*, evidence showed that the dog responsible for killing a cat
2 had previously been designated as a “potentially dangerous animal”
3 (“PDA”) and as a consequence the dog’s owner, the debtor, was legally
4 required to use extraordinary methods of control. Failure to abide by these
5 requirements could result in criminal prosecution. Nevertheless, the debtor
6 consistently failed to adhere to these restrictions and, as a result, the
7 plaintiff’s cat was killed. In addition to its designation as a PDA, the dog
8 had been trained by the debtor to fight. On appeal, the Bankruptcy
9 Appellate Panel affirmed the bankruptcy court’s decision against the debtor.

10 It carefully considered all of the evidence before it and
11 determined that the [debtors’] conduct of knowingly owning a
12 dog declared a PDA, a dog they trained to fight with a
13 propensity for aggression and which had killed at least one
14 other cat, combined with their intentional and repeated breach
15 of their duties to confine, muzzle, or leash [the dog], or post
16 warning signs, constituted a willful act or willful omission. To
17 show their conduct was willful, [the plaintiff] need not prove
18 that the [debtors] intended to inflict injury on [the cat]; it was
19 sufficient that they knew, based on [the dog’s] history, that
20 injury to [the cat] was substantially certain to result if they
21 failed to perform their duties. The [debtors’] repeated
22 intentional failure to comply with their duties, which
23 necessarily caused [the cat’s] death, without just cause or
24 excuse, provides a sufficient basis for the bankruptcy court’s
25 determination that their conduct was also malicious.

19 *Id.* at *5, internal citations omitted.

20 The circumstances in the case at hand are more similar to those in
21 *Holmes*, and do not approach those in *Lababit*. Although the Debtor had
22 previously been “warned” by Animal Control, after the “menacing” and
23 “chasing” incidents, the dogs had never been declared as dangerous, they
24 had not been trained to attack or fight, and the Debtor was not under any
25 statutory duty to keep them restrained. Heredia argues, with reference to
26 the Animal Control Report (footnote 2, *supra*), that the dogs had been
27 known to “kill cats and chase a horse.” Putting aside for now the obvious
28 evidentiary problems with this statement, even if the Debtor knew of this,

1 the fact that the dogs may have scared a couple of neighbors, killed some
2 stray cats, and chased a horse in the semi-rural area where he lived, does not
3 necessarily make the dogs “vicious” or “potentially dangerous” and does
4 not necessarily put the Debtor on notice that somebody is substantially
5 certain to be seriously injured.

6 To survive this Motion, Heredia must plead a “plausible” (as
7 opposed to possible) showing that the Debtor knew with “substantial
8 certainty” that his dogs would physically attack and injure someone. The
9 allegations in this Complaint fail to do so.

10 **Dismissal with Prejudice.** Civil Rule 15(a)(2), incorporated by
11 FRBP 7015, permits amendment of the Complaint only with the Debtor’s
12 consent or leave of the court. Such leave to amend “should freely” be given
13 “when justice so requires.” *Id.* However, “liberality in granting leave to
14 amend is subject to several limitations.” *Ascon Props., Inc. v. Mobil Oil*
15 *Co.*, 866 F.2d 1149, 1160 (9th Cir. 1987). For example, where amendment
16 would cause the defendant undue prejudice, would be futile, or create undue
17 delay, leave need not be granted. This is especially true where the
18 complaint has been previously amended.

19 The question here is whether Heredia should be given a further
20 opportunity to plead a claim that plausibly fits within the narrow boundaries
21 of § 523(a)(6). The court has already dismissed this adversary proceeding
22 twice and instructed Heredia’s counsel of the need for more facts. At oral

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1 argument, Heredia’s counsel stated that he had already reviewed the facts
2 “with a fine-toothed comb” which suggests that there are no more relevant
3 facts to be pled. Further amendment would prejudice the Debtor and cause
4 undue delay. The Complaint will therefore be dismissed without leave to
5 amend.

6 Dated: January 23, 2014

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8 /s/ W. Richard Lee
9 W. Richard Lee
10 United States Bankruptcy Judge
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