SO ORDERED.
SIGNED this 5th day of August, 2020

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3:19-bk-32815-SHB
Chapter 7

MARY ROSA RODRIGUEZ
aka MARY FISHER RODRIGUEZ

Debtor

PEGGY C. EVANS

Plaintiff

v.

Adv. Proc. No. 3:19-ap-3053-SHB

MARY ROSA RODRIGUEZ
aka MARY FISHER RODRIGUEZ

Defendant

MEMORANDUM AND ORDER

On November 27, 2019, Plaintiff, *pro se*, filed a Notice of Objection ("Complaint"), commencing this adversary proceeding, which asks the Court to determine that a judgment entered in her favor against Defendant is nondischargeable. [Doc. 1.] Defendant filed an Answer to Plaintiff's Complaint ("Answer") on April 2, 2020 [Doc. 14], asserting affirmative defenses

under Federal Rules of Civil Procedure 8, 10(b), and 12(b)(6).[1] Following the scheduling conference, the Court entered an Order on May 8, 2020 [Doc. 18], allowing through May 18, 2020, for Defendant to file a dispositive motion and through June 19, 2020, for Plaintiff to respond.

Defendant filed what is entitled as a "Motion to Dismiss" ("Motion") and brief in support on May 18, 2020 [Docs. 20, 21], arguing that dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted."[2] Plaintiff timely responded in opposition to the Motion on June 12, 2020 ("Response") [Doc. 22], citing 11 U.S.C. § 523(a)(6) as the basis under which she seeks a determination of nondischargeability and including with her response a number of documents, including photographs, to support the underlying judgment. Because the pleadings are closed and the Answer included Rule 12(b)(6) as an affirmative defense, the Court will deem the Motion as seeking dismissal under Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. *See Boddy v. City of Memphis*, No. 2:19-cv-02190, 2020 WL 4340228, at *2 (W.D. Tenn. July 28, 2020).

Courts apply the same standard for Rule 12(c) motions as for Rule 12(b)(6) motions, which will be granted when, after taking as true "all well-pleaded material allegations of the pleadings of the opposing party . . . , 'no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.'" *Jackson v. Professional Radiology, Inc*., 864 F.3d 463, 466 (6th Cir. 2017) (quoting *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith,*

[1] Although the Answer incorrectly references "F.R. Civ. P. 11(b)(6)" as the Rule, it is clear from the remainder of the defense ("Plaintiff fails to state a claim upon which relief can be granted") that the reference to Rule 11 is a typographical error.

[2] Subsections (b)-(i) of Rule 12 are applicable in adversary proceedings under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

Inc., 479 F.2d 478, 480 (6th Cir. 1973); *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"A [complaint] that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a).[3]

> While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Twombly, 550 U.S. at 555 (alteration in original) (citations omitted).

As the Sixth Circuit has explained:

> [Although] a complaint will survive a motion to dismiss if it contains "either direct or inferential allegations respecting all material elements" necessary for recovery under a viable legal theory, [the] court "need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice."

Philadelphia Indem. Ins. Co. v. Youth Alive, Inc., 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 275-76 (6th Cir. 2010)).

> 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

[3] Rule 8 is applicable in adversary proceedings under Rule 7008 of the Federal Rules of Bankruptcy Procedure.

of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57). The Court also should "'consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (alteration in original) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

Here, the Court has thoroughly reviewed all of the relevant filings – the Complaint, Answer, Motion, and Response – as well as all attachments to those filings.[4] The Complaint "disputes the debtor's right to a discharge of debt . . . for destruction of property [totaling] $25,321.49." [Doc. 1 at p. 2.] Plaintiff was awarded a judgment against Defendant in the Roane County General Sessions Court for $24,999.99 (plus 7.5% interest and court costs) on August 2, 2019, following trial ("Judgment"). She asserts in her Complaint that the Judgment is nondischargeable, noting only that the Judgment was issued for destruction of property. [Doc. 1 at pp. 1-2, 5.] In response to Defendant's argument in her Answer, Motion, and brief that Plaintiff did not comply with Rule 7008 because she did not state the Bankruptcy Code[5] section in her Complaint, Plaintiff identified 11 U.S.C. § 523(a)(6) as the applicable Code section, asserting as follows:

> Pursuant to rule 523(a)(6) the debtor did willfully and knowingly cause damage or injury to personal property of the plaintiff without just cause or excuse
>
> . . . Keeping dogs in a house that was damaged by the dogs urinating and defecating on hardwood floors, on walls, woodwork. Then urine and feces was allowed to accumulate over a five year period the debtor knew the damage was

[4] On July 17, 2020, Defendant, through counsel, filed a document entitled "Answer to Response of Plaintiff (Document 22)." [Doc. 23.] This document, however, was filed without permission and is not authorized by the Federal Rules of Civil Procedure or Federal Rules of Bankruptcy Procedure. The document, therefore, is stricken from the record and has not been considered by the Court in its final determination.

[5] Plaintiff incorrectly references the Bankruptcy Act [Doc. 21 at p. 5] as well as inapplicable provisions of Chapter 13 of the Bankruptcy Code [*id.* at p. 2].

> being done to the property, therefore this was done in a willful and malicious manner that caused damage and injury to the personal property of the plaintiff, therefore it was directed towards her [*sic passim*].

[Doc. 22 at p. 1.] Plaintiff also filed with her Response photographs and stated:

> The debtor showed no remorse for having caused the damage to the property of the plaintiff. The judge (Terry Stevens) ask her if she kept dogs in the house and her response was" What difference does it make they were old floors anyway. [*sic passim*]
>
> 1) Den floor totally covered in dog feces and urine 1/4 to 1/2 inch deep
> 2) Nine carpenter bags of cans and trash in the yard
> 3) A/C depleted of Freon and wired backward
> 4) Well pump clogged with lint from the dryer vent, burned out motor
> 5) Roach bugs in the thousands, 5 bug bombs and 5 gallons of Home Defense bug poison
> 6) Front storm door, broken and thrown in the back yard
> 7) Five broken windows, one by gunshot
> 8) All floors stained by dog feces and urine
> 9) Kitchen and bath linoleum urine stained
> 10) Screens torn on doors and windows.

[Doc. 22 at p. 2.] The unauthenticated[6] photographs filed with her Response are not referenced in her Response, but presumably they reflect staining and damage to floors, walls, windows, and moldings, as well as debris. [*See* Doc. 22-1.]

Section 523(a) actions are construed liberally in favor of debtors and strictly against creditors, who bear the burden of proving the necessary elements by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). To satisfy the statutory elements

[6] Although Plaintiff was permitted to respond with "[a]n affidavit or declaration . . . to . . . oppose a motion," such "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Plaintiff's Response and attachments, however, are not accompanied by any affidavit or declaration, and the Response does not even identify or make any attempt to explain the photographs attached. "While a court may give a pro se party the benefit of the doubt in construing pleadings, allegations, and arguments, pro se parties nevertheless proceed at their own peril without counsel and are bound by the same rules of procedure and evidence as a party represented by counsel . . . ." *Kreitzer v. Household Realty Corp. (In re Kreitzer)*, 489 B.R. 698, 709 n.6 (Bankr. S.D. Ohio 2013). Because the Court ultimately finds that Defendant's Motion is well taken even considering the photographs, the Court does not strike Plaintiff's unauthenticated exhibits to her Response.

of § 523(a)(6) "for willful and malicious injury by the debtor to another entity or to the property of another entity," Plaintiff must prove "(1) the existence of "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), and (2) that Defendant either desired to cause injury or believed with substantial certainty that injury would occur. *See Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999) (citing Restatement (Second) of Torts § 8A, at 15 (Am. Law Inst. 1964)); *see also Guthrie v. Kokenge (In re Kokenge)*, 279 B.R. 541, 543 (Bankr. E.D. Tenn. 2002).

"Mere 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 (B.A.P. 6th Cir. 2007). Even recklessness is insufficient. *See In re Kokenge*, 279 B.R. at 543. "That a reasonable debtor 'should have known' that his conduct risked injury to others is simply insufficient. Instead, the debtor must 'will or desire harm, or believe injury is substantially certain to occur as a result of his behavior.'" *Id.* (quoting *In re Markowitz*, 190 F.3d at 465 n.10). "Lack of excuse or justification for the debtor's actions will not alone make a debt nondischargeable under § 523(a)(6)." *S. Atlanta Neurology & Pain Clinic, P.C. v. Lupo (In re Lupo)*, 353 B.R. 534, 550 (Bankr. N.D. Ohio 2006).

In a factually similar case, *R & L Pricecorp LLC v. Hall (In re Hall)*, No. 11-35350, Adv. No. 12-3026, 2013 WL 1739658, at *3 (Bankr. E.D. Tenn. Apr. 23, 2013), this Court explained with specificity the requirements of § 523(a)(6):

> "Although the 'willful' and 'malicious' requirements will be found concurrently in most cases, the terms are distinct, and both requirements must be met under § 523(a)(6)." *Lupo*, 353 B.R. at 550. "An act will be deemed 'willful' only if it was undertaken with the actual intent to cause injury," *Fox*, 370 B.R. at 119, requiring the court to "'look into the debtor's mind subjectively' in order to determine whether the debtor intended to cause the consequences of his act or believed that the consequences were substantially certain to result from his act[.]" *Monsanto Co. v. Wood (In re Wood)*, 309 B.R. 745, 753 (Bankr. W.D. Tenn. 2004). "The injury [caused] itself must be deliberate or intentional, not just a deliberate or intentional

> act that leads to injury." *Advantage Bank v. Starr (In re Starr),* No. 09-64079, Adv. No. 10-6006, 2012 WL 4714978, at *12 (Bankr. N.D. Ohio Oct. 2, 2012). On the other hand, "[a]n act is 'malicious' if it is undertaken 'in conscious disregard of one's duties or without just cause or excuse' . . . [and does] 'not require ill-will or specific intent to do harm.'" *Fox,* 370 B.R. at 119 (quoting *Wheeler v. Laundani,* 783 F.2d 610, 615 (6th Cir. 1986)); *see also Ewers v. Cottingham (In re Cottingham),* 473 B.R. 703, 709 (B.A.P. 6th Cir. 2012). "The conduct 'must be more culpable than that which is in reckless disregard of creditors' economic interests and expectancies, as distinguished from . . . legal rights. [K]nowledge that legal rights are being violated is insufficient to establish malice . . . .' " *Steier v. Best (In re Best),* 109 F. App'x 1, 6 (6th Cir. 2004) (quoting *First Fed. Bank v. Mulder (In re Mulder),* 306 B.R. 265, 270 (Bankr. N.D. Iowa 2004)). Maliciousness may be proved by a showing that "(1) the [defendant] has committed a wrongful act, (2) the [defendant] undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause or excuse for the action." *Adamovic v. Lazarevic (In re Lazarevic),* No. 11-10585, Adv. No. 11-1048. 2012 WL 4483901, at *21 (Bankr. E.D. Tenn. Sept. 27, 2012) (quoting *JPMorgan Chase Bank, NA v. Algire (In re Algire),* 430 B.R. 817, 823 (Bankr. S.D. Ohio 2010)).

In re Hall, 2013 WL 1739658, at *3 (alterations in original).

The Judgment speaks for itself, in that Plaintiff was awarded $24,999.99 plus 7.5% post-judgment interest and court costs for "destruction to property" [Doc. 1 at p. 3]. Defendant does not dispute that she owes the amount awarded in the Judgment, which followed a trial before the general sessions court, or that she is responsible for the damage to Plaintiff's property. Although "[c]ourts recognize that where the debtor did not physically damage the person or property, the debtor may remain liable for purposes of nondischargeability," being responsible for the damage alone is insufficient to satisfy the requirements of § 523(a)(6), and "[a] majority of courts have concluded that failure to maintain a rental property, alone, is not enough to support a claim of non-dischargeability under section 523(a)(6)." *DeWitt v. Jacob (In re Jacob)*, 615 B.R. 259, 270, 275 (Bankr. E.D. Wis. 2020) (finding dischargeable the damage by the debtor, a former tenant, that included several months' of dog waste, garbage throughout the home, marks on the walls, and personalty that was broken or ruined with irreversible cigarette smoke odor, stating that "the damage falls on the spectrum between crudeness and gross negligence, but is not a type of

willful and malicious injury"). "The determining factor separating these cases is 'the court's conclusion that the debtors' conduct was negligent, rather than intentional. Debts based on negligence are dischargeable. Debts based on willful and malicious conduct are not.'" *Id.* at 271 (quoting *Hynard v. Merkman* (*In re Merkman)*, 604 B.R. 122, 129 (Bankr. D. Conn. 2019)). *Compare, e.g.*, *Sparks v. King (In re King)*, 258 B.R. 786, 797 (Bankr. D. Mont. 2001) (holding that leaving personal property and trash in a rental property was not a willful and malicious injury, nor was the fact that the debtor punched holes in the walls with his fist when that act was not done with the purpose of causing harm to the landlord), *and Smith v. Burgos (In re Burgos)*, No. AP 15-1020-WHD, 2015 WL 9435398, at *3 (Bankr. N.D. Ga. Nov. 9, 2015) (finding that on its own, the evidence of extensive damage to the rental home "can be proof of utter recklessness or deplorable apathy, but without an allegation that the Debtors had a motive to cause her injury, acted with intent to injure, or acted with the knowledge that their conduct would inflict injury, the Plaintiff cannot prevail" under the exception provided in § 523(a)(6), *with O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 826 (Bankr. N.D. Ohio 2000) (determining that the damages were nondischargeable under § 523(a)(6) after noting that the debtors failed to discipline their children even after their propensity for vandalism was known, they failed to notify the landlord of damage in contravention of state law, the damages occurred when the relationship between the parties was deteriorating, and the debtors did not show remorse during testimony) *and Selzer v. Alderson (In re Alderson)*, No. A03-4059, 2004 WL 574134, at *3 (Bankr. D. Neb. Feb 11, 2004) (finding a malicious injury when the debtor, *inter alia*, removed fixtures, spray-painted the furnace and other appliances, where the damage appeared to have been done deliberately on moving out solely to injure the plaintiff).

Here, Plaintiff has not alleged that Defendant had a motive to cause [Plaintiff] injury, acted with intent to injure [Plaintiff], or acted with the knowledge that [her] conduct would

inflict injury" on Plaintiff. *In re Burgos*, 2015 WL 9435398, at *3. Without such an allegation, even if the Court considers the unauthenticated photographs supplied by Plaintiff, she has not sufficiently pleaded the requisite elements of a claim under § 523(a)(6). When damage to a landlord's property is caused by the presence of animals within a property unit, more is required. As discussed by the *Jacob* court,

> In cases where the damage may have been caused by dogs, children, or friends, however, there still must be a showing that the debtor encouraged the actions. *O'Brien v. Sintobin (In re Sintobin)*, 253 B.R. 826, 831 (Bankr. N.D. Ohio 2000) (finding that the debtor-defendants "influenced and encouraged their children and their friends to commit acts of vandalism"). The debtor's encouragement "can range from overt encouragement to simply an omission, if such an omission was calculated by the debtor in a willful and malicious manner to cause injury." *Id.*; *see also Cutler v. Lazzara (In re Lazzara)*, 287 B.R. 714, 723 (Bankr. N.D. Ill. 2002) (finding that, although some damage was physically caused by others, the debtor permitted the damage to occur while he was in control of the apartment).
>
> By negative implication, without evidence of the debtor causing the injury or a showing of encouragement or influence, a creditor cannot satisfy the first element of section 523(a)(6). *See Hynard v. Merkman (In re Merkman)*, 604 B.R. 122, 130 (Bankr. D. Conn. 2019) (finding that another woman living in the rental property shortly after damage was discovered represented a plausible intervening cause of the damage).

615 B.R. at 270; *see also Leneski v. Smith (In re Smith)*, No. 06-1044, Adv. 07-14, 2007 WL 4510309, at *7 (Bankr. N.D. W. Va. Dec. 18, 2007) ("Animals (and children too) inevitably will cause carpet to be maculated. The mere fact that carpet smells of animal urine and feces does not rise to the level of a wilful [*sic*] and malicious injury under § 523(a)(6)"); *Delaney v. Carlyle (In re Carlyle)*, No. 06–4188, 2007 Bankr. LEXIS 193 (Bankr. W.D. Mo. Jan. 23, 2007) (holding that damage done by dogs and cats to the property and the stench of urine so strong that it made the landlord vomit, did not constitute a willful and malicious injury by the debtor to the property of the landlord); *Norm Gershman's Things to Wear, Inc. v. Peterson (In re Peterson)*, 332 B.R. 678, 687–89 (Bankr. D. Del. 2005) (holding that allowing a dog to urinate and defecate on the carpet was negligent or reckless, but not willful and malicious; the evidence did not establish that

the debtor deliberately made her dogs ruin the carpet in the last month of the lease term); *Cutler v. Lazzara (In re Lazzara)*, 287 B.R. 714, 717, 725 (Bankr. N.D. Ill. 2002) (concluding that a debtor did not willfully injure a landlord's property by allowing a dog to repeatedly urinate and defecate on the carpet).

Although Plaintiff pleaded that she obtained a judgment against Defendant for "destruction of property," which Defendant does not dispute, Plaintiff has not pleaded that the damage was caused by Defendant's willful and malicious actions with respect to the rental property as those terms are defined within the Sixth Circuit for the purposes of nondischargeability under § 523(a)(6).

Taking the allegations of the Complaint as true and considering them in the light most favorable to Plaintiff, for the reasons set forth herein, the Court directs the following:

1. The "Motion to Dismiss" filed by Defendant on May 18, 2020 [Doc. 20], which the Court has deemed to be a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, applicable to this adversary proceeding by virtue of Rule 7012 of the Federal Rules of Bankruptcy Procedure, is GRANTED.

2. Plaintiff's complaint against Defendant filed on November 27, 2019 [Doc. 1], is DISMISSED.

3. The August 2, 2019 Judgment awarded to Plaintiff following a trial before the Roane County General Sessions Court in the amount of $24,999.99 (plus 7.5% interest and court costs) "for destruction of property" [Doc. 1 at p. 3] was discharged in Defendant's underlying Chapter 7 bankruptcy case on January 10, 2020.

# # #