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 UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF SOUTH CAROLINA

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 BRENDA K. ARGOE, CLERK
 United States Bankruptcy Court
 Columbia, South Carolina (6)

U.S. DISTRICT COURT
 DIST. OF SOUTH CAROLINA
 Bankruptcy Case No.: 98-10581-W

In re:
 Diane Talbot,

 Debtor.

 Scott Hurlbert,
 Plaintiff,
 v.
 Diane Talbot,

 Defendant.

ENTERED
SEP 21 1999
 V. L. D.

Adversary Proceeding No.: 99-80064-W

ORDER AND JUDGMENT

THIS MATTER comes before the Court upon the trial on the merits. The complaint seeks to have the debt of Diane Talbot ("Talbot") to Scott Hurlbert ("Hurlbert") determined to be non-dischargeable in this bankruptcy pursuant to Section 523(a)(2)(A) of Title 11 of the United States Code of Laws (the Bankruptcy Code). In response, Talbot counterclaimed for her attorney fees pursuant to Section 1927 of Title 28 of the United States Code of Laws (the "Frivolous Pleadings Act"). The trial was held on September 2, 1999. After considering the stipulations contained in the pre-trial order, the testimony of the witnesses, the credibility of the witnesses and all the evidence presented, this Court grants judgment in favor of Talbot on the Plaintiff's complaint and grants judgment in favor of Hurlbert on Talbot's counterclaims. In so holding, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACTS

1. The relationship of the parties may be summarized in the following chronology of events: a) in 1991, Talbot and Hurlbert met in Alaska; b) in 1993, Talbot and Hurlbert started dating and then began living together in a relationship where each paid approximately one half of the living expenses; c) in 1994 or 1995, Talbot and Hurlbert got engaged; d) in May 1995, Talbot moved to South Carolina to attend graduate school and pursue a masters degree; e) in July 1995, Hurlbert transferred some of Talbot's credit card debt to one of his credit cards; f) in August 1995, Hurlbert visited Talbot in South Carolina; g) in October 1995, Hurlbert again visited Talbot in South Carolina; h) in November 1995, Hurlbert transferred additional debt from Talbot's credit cards to one of his credit cards; i) in December 1995, Talbot returned to Alaska during the semester break, visited with Hurlbert and the parties participated in a marriage ceremony on the last day of visit, j) in March 1996, Talbot met Thomas Casesse ("Casse"); and k) in May 1996, Talbot began dating Casesse and refused to continue her relationship with Hurlbert.

2. Hurlbert testified that he transferred the credit card debt because Talbot represented that she loved him and was committed to marrying him. Until May of 1996, Hurlbert testified that Talbot never did anything or said anything that indicated that her love for Hurlbert was not genuine. In fact, the parties did participate in a marriage ceremony in December 1995.

3. This court finds that Hurlbert has not shown by a preponderance of the evidence that Talbot's representations of affection or intentions toward him were false prior to the credit card transfers in July and November 1995.

4. This court finds that Hurlbert has not shown by a preponderance of the evidence that Talbot intended to deceive Hurlbert when she stated that she loved him and intended to marry him

prior to the credit card transfers.

5. This court finds that Hurlbert has not shown by a preponderance of the evidence that Talbot knew that her representations of love and intentions to marry him were false prior to the credit card transfers.

6. In June on July of 1996, Talbot and Hurlbert had a telephone conversation in which Talbot stated that she did not love Hurlbert and was lying to him since early fall. Over the objection of the Talbot, Hurlbert offered into evidence and this court admitted into evidence a partial transcript of this telephone conversation. Talbot testified that she made these statements because Hurlbert had been threatening and harassing her. Talbot testified that the statements were made while the parties were arguing and she made these statements not because they were true but because she wanted to hurt Hurlbert the way he had been hurting her. The Court finds that these words stated in a moment of anger and frustration are of little probative value and that the chronology of the parties actions is entitled to greater weight in evaluating the evidence presented.

CONCLUSIONS OF LAW

Hurlbert bears the burden of establishing that the debt is non-dischargeable by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659-60, 112 L.Ed.2d 755 (1991). The necessary elements of Hurlbert's case under Section 523(a)(2) are:

- a. A present material misrepresentation, either oral or in writing. *See In re Buttendorf*, 11 B.R. 558 (Bankr. D. Vt. 1981) (promises of future performance are insufficient); *In re Bogstad*, 779 F.2d 370 (7th Cir. 1985) (an important or substantial misrepresentation is needed); *Engler v. Van Steinburg*, 744 F.2d 1060 (4th Cir. 1984) (representation may be made orally or in writing); *In re Van Horne*, 823 F.2d 1285 (8th Cir. Iowa 1987) (silence or concealment may constitute

the false representation).

- b. Knowledge that the representation is false. *In re Colvin*, 117 B.R. 484 (Bankr. E.D. Mo. 1990) (discharge granted where mentally challenged debtor did not know the falsity of her statements); see also *Morimura, Arai & Co. v. Taback*, 279 U.S. 24, 73 L. Ed. 586, 49 S. Ct. 212 (1929) ("reckless indifference to actual facts" is equivalent to intentional misrepresentation).
- c. Intent to defraud or deceive. *In re Devers*, 759 F.2d 751 (9th Cir. 1985); *FDIC v. Reisman*, 149 B.R. 31 (Bankr. S.D.N.Y. 1993) (intent to deceive may be inferred from surrounding circumstances). This intention is usually determined by the totality of the circumstances surrounding the representation. *Sinclair Oil Corp. v. Jones (In re Jones)*, 31 F.3d 659, (8th Cir. 1994).
- d. Justifiable Reliance by the creditor. *Field v. Mans*, 133 L. Ed. 2d 351, 116 S. Ct. 437 (1995); See *Greenfield State Bank v. Copeland*, 330 F.2d 767 (9th Cir. Cal. 1964) (no reliance in fact because the loan was granted before the representation); *In re Geyen*, 11 B.R. 70 (Bankr. W.D. La. 1981) (after the fact representations were not relied upon); *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277 (11th Cir. 1995) (justifiable reliance means a creditor's conduct should be determined by the creditor's own capacity and knowledge); *In re Kirsh*, 973 F.2d 1454 (9th Cir. Cal. 1992) ("justifiable reliance" is required not "actual reliance" or "reasonable reliance").
- e. Damage. *In re Collins*, 946 F.2d 815 (11th Cir. 1991); *In re Siriani*, 967 F.2d 302 (9th Cir. 1992).

Hurlbert did not prove by a preponderance of the evidence that the representations were false, were known to be false, or that they were intended to deceive.

In the two cases cited by the parties that relate to representations of emotional commitments

as the basis for an action under Section 523(a)(2) of the Bankruptcy Code, this Court finds support for its determination. In the case of *In the Matter of Van Horne*, 823 F.2d 1285 (8th Cir. 1987), the Fifth Circuit found circumstantial evidence indicating a misrepresentation when the husband left his wife a mere five (5) days after the completion of a refinance between the husband and the wife's parents. In the case of *In re Graham*, 194 B.R. 369 (Bankr. E.D. Pa. 1996), the court included the fact that the couple remained together for several months after the financial transaction to determine that there was a lack of circumstantial evidence to conclude that the representation was false. In this case, not only did Talbot and Hurlbert continue their relationship for several months after the financial transaction but actually participated in a marriage ceremony. Therefore, this Court finds for Talbot on Hurlbert's complaint under Section 523(a)(2) of the Bankruptcy Code. Hurlbert's claims against Talbot are therefor discharged in this bankruptcy.

Talbot has counterclaimed pursuant to Section 1927 of Title 28 of the United States Code of Laws (the "F frivolous Pleadings Act"). This section provides, in part, that:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney fees reasonably incurred because of such conduct.

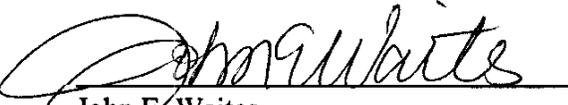
This Court does not find that Hurlbert's or his attorney's action rise to the level of being unreasonable or vexatious. Therefore, this Court finds in favor of Hurlbert on Talbot's counterclaim.

IT IS THEREFORE,

ORDERED, ADJUDGED AND DECREED THAT Talbot has judgment against Hurlbert on his complaint under Section 523(a)(2) of the Bankruptcy Code and that Hurlbert has judgment

against Talbot on her counterclaim under Section 1927 of Title 28 of the United States Code of Laws. The obligation of Diane Talbot, based upon Hurlbert's Pre-Petition Judgement, is discharged.

AND IT IS SO ORDERED.


John E. Waites
Judge

Columbia, South Carolina
September 20, 1999

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

SEP 21 1999

Smith Gleissner Jgmt Index
~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL

Deputy Clerk