UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:	Bankruptcy Case No.: 98-10581-W
Diane Talbot, Debtor.	
Scott Hurlbert, Plaintiff,	Adversary Proceeding No.: 99-80064-W
v.	
Diane Talbot, Defendant.	**JUDGMENT**

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Defendant's motion to dismiss the cause of action under § 523(a)(15) is granted. The Defendant's motion to dismiss the cause of action under § 523(a)(2) is denied.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 10, 1999.

CERTIFICATE OF MAILING

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~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

VANNA L. DANIEL

Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:	Bankruptcy Case No.: 98-10581-W
Diane Talbot, Debtor.	
Scott Hurlbert, Plaintiff,	Adversary Proceeding No.: 99-80064-W
v.	
Diane Talbot, Defendant.	**ORDER**

THIS MATTER comes before the Court upon the Defendant's Motion to Dismiss the 11 U.S.C. §§ 523(a)(15) and 523(a)(2)[1] causes of action brought by Scott Hurlbert ("Hurlbert" or the "Plaintiff") and upon the stipulations of the parties at the pre-trial conference.

This Court finds that the subject debt is not a debt covered by § 523(a)(15) and therefore grants Talbot's motion to dismiss as to this cause of action. This Court further finds that the prior state court order does not preclude Hurlbert's § 523(a)(2)(A) cause of action and therefore denies the motion to dismiss this cause of action. Based upon the evidence presented and the presentation of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The subject debt was created in July 1995 and in November 1995, when Hurlbert transferred the balances that Talbot owed to several credit card companies to his credit card .

[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, et seq., shall be by section number only.

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2. On December 31, 1995, Hurlbert and Talbot were married in Alaska but never consummated the marriage. At Hurlbert's request, the Alaskan state court determined that the marriage was *void ab initio.*

3. The order of the Alaskan state court does not contain any of the indicia associated with domestic relations orders. It does not list the assets, debts, or obligations; does not determine the appropriate proportion of marital assets to be distributed based upon the contributions of each party to the marriage; does not distribute the marital assets between the two parties; does not make a determination of alimony or child support; and does not provide for a termination of the marriage of the parties. The order is not a divorce decree and is not a separation agreement.

CONCLUSIONS OF LAW

In a Motion to Dismiss, the moving party bears the burden of proving that the debt is non-dischargeable by a preponderance of the evidence. See, e.g., Fahey Banking Co. v. Parsell (In re Parsell), 172 B.R. 226, 230 (Bankr. N.D. 1994); Thomson McKinnon Securities, Inc. v. Bank of N.Y. (In re Thomson McKinnon Securities), 147 B.R. 330, 333 (Bankr. S.D. N.Y. 1992).

Section 523(a)(15) relates to marital debts and debts associated with property settlements. Absent some authority suggesting that § 523(a)(15) is to apply to an annulled marriage that has been determined to be *void ab initio*, this Court is not inclined to interpret § 523(a)(15) to include the debt in this case. Section 523(a)(15)'s specific reference to § 523(a)(5) makes it clear that the two subsections are dealing with the same category of obligations. Specifically, these two subsections relate to debts and obligations incident to a marriage. In this case, the debt was incurred between the two parties prior to a marriage which was later determined to be null and void.

The legislative history to § 523(a)(15) makes it clear that Congress was dealing with property settlements involved in marital litigation. The legislative history states, in relevant part:

> [This] Subsection . . . adds a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. The Committee believes that payment of support needs must take precedence over property settlement debts. The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.
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> The new exception to discharge, like the exceptions under Bankruptcy Code section 523(a)(2), (4) and (6) must be raised in an adversary proceeding during the bankruptcy case within the time permitted by the Federal Rules of Bankruptcy Procedure. Otherwise the debt in question is discharged. The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse – an obligation to hold the spouse or former spouse harmless – which is within the scope of this section.

140 CONG. REC. H10752, H10770 (daily ed. Oct. 4, 1994) (statement of Chairman Brooks); see also Campbell v. Campbell (In re Campbell), 198 B.R. 467, 471 (Bankr. D.S.C. 1996); Collins v. Hesson (In re Hesson), 190 B.R. 229, 233-34 (Bankr. D. Md. 1995). In this case, the subject debt does not arise out of a property settlement debt and is not being "asserted only by the other party to the divorce or separation." In re Campbell, 198 B.R. at 471.

In addition, the state court order does not determine, distribute, or apportion the property and liabilities of the marriage; thus, it cannot be deemed to constitute a divorce decree or separation agreement. The legislative history makes it clear that § 523(a)(15) is intended to apply to property settlements approved by order of some court. Case law interpreting § 523(a)(15) also establishes that this section deals with marriages and the division of marital property and obligations. See, e.g., Oswald v. Asbill (In re Asbill), 236 B.R. 192, 196 (Bankr. D.S.C. 1999); Williams v. Williams (In re Williams), 210 B.R. 34, 345-48 (Bankr. N.D. Neb. 1997); Sterna v. Paneras (In re Paneras), 195 B.R. 395, 403 (placing the burden on the plaintiffs to prove that the debt was "awarded by a court in the course of a divorce proceeding or separation"); Setzler v. Guy (In re Guy), 95--8143-W (Bankr. D.S.C. 1995).

In regards to the § 523(a)(2)(A) cause of action, Talbot has raised the affirmative defense of res judicata. As it relates to claims of dischargeability under § 523, the Supreme Court addressed this issue in Brown v. Felsen, 442 U.S. 127, (1979). This Court does not believe the issues relating to dischargeability under § 523(a)(2)(A) were previously litigated and determined by the state court order. It is therefore,

ORDERED, that Talbot's motion to dismiss the cause of action under § 523(a)(15) is granted. Talbot's motion to dismiss the cause of action under § 523(a)(2) is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
September 10, 1999