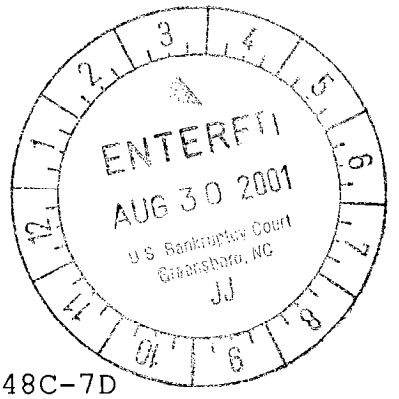

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Joan I. Merritt,	)	Case No. 99-81948C-7D
	)	
Debtor.	)	
	)	
Joan I. Merritt,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01-9001
	)	
Otis Dunston,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This adversary proceeding came before the court on August 9, 2001, for trial. Dana G. Jones appeared on behalf of the plaintiff and William L. Yaeger appeared on behalf of the defendant.

MATTER BEFORE THE COURT

In the complaint, the plaintiff seeks an adjudication that her obligations to the defendant under a state court consent order were dischargeable and, in fact, were discharged in plaintiff's bankruptcy case. Defendant's answer denies that plaintiff's obligations to him have been discharged and pleads res judicata as an affirmative defense. Defendant argues that plaintiff is bound by a state court adjudication that plaintiff's obligations to defendant were not discharged because of a lack of notice to the defendant in the bankruptcy case. The evidence before the court

consists of state court orders and related documents that were attached to the pleadings, the admissions contained in the pleadings, the documents submitted by the parties regarding the motion for summary judgment and the court file in plaintiff's Chapter 7 case. Although it appears that the facts are not in dispute, the court resolves any conflicts in the evidence that may exist and, based upon the record before the court, finds the facts to be as follows:

FACTS

1. The plaintiff and defendant were married on or about July 21, 1962, and lived together until August 24, 1997, when they separated.

2. The plaintiff filed a complaint for divorce from bed and board and for equitable distribution on November 12, 1997, in the District of Durham County ("the state court action"). On January 5, 1998, the defendant filed an answer and counterclaim seeking a divorce from bed and board, equitable distribution and certain temporary relief.

3. On December 29, 1998, a consent order was entered in the state court action. Among other things, the order adjudged that the defendant was to have exclusive ownership of the marital home and required the plaintiff to pay $229.00 per month on an obligation secured by a deed of trust on the marital home. These provisions were included in a paragraph of the consent order that

recited that the parties had "agreed to resolve the issue of Equitable Distribution and waived their right to a hearing in the matter based upon the following agreement set forth below . . . ."

4. On August 30, 1999, the plaintiff filed in this court a petition for relief under Chapter 7 of the Bankruptcy Code.

5. The defendant was not listed as a creditor in the schedules filed by the Debtor in her Chapter 7 case.

6. On December 6, 1999, an order was entered in plaintiff's bankruptcy case granting the plaintiff a discharge.

7. In February of 2000, the defendant initiated proceedings in the state court action seeking to enforce the provision in the consent order that ordered the plaintiff to pay the sum of $229.00 per month on the obligation secured by the marital residence. A hearing was held in the state court on February 25, 2000, at which the plaintiff pleaded her bankruptcy discharge as a bar to the plaintiff being ordered to pay $229.00 per month under the consent order. The defendant pleaded a lack of notice of the bankruptcy filing as a ground for finding that plaintiff's obligation under the consent order had not been discharged.

8. The state court expressly rejected plaintiff's argument that the $229.00 per month obligation had been discharged and adjudged that "Defendant's [Merritt's] obligation to the Plaintiff [Dunston] on the home equity line was not discharged due to her failure to comply with the obligation to list and provide notice to

creditors in her bankruptcy." The state court concluded that the plaintiff had a continuing obligation to make the $229.00 per month payments to the defendant and ordered the plaintiff to "pay such" pursuant to an order entered on May 5, 2000.

9. The plaintiff did not appeal from the May 5, 2000 order.

ANALYSIS

Defendant's principal argument is that the state court order entered on May 5, 2000, is binding on the plaintiff under the doctrine of res judicata and bars the plaintiff from obtaining any relief in this adversary proceeding. Specifically, defendant asserts that the dischargeability of plaintiff's obligation to pay $229.00 per month already was raised and adjudicated in the state court and may not be raised again by the plaintiff in this proceeding. Hence, the court is called upon to determine the preclusive effect, if any, of the May 5, 2000 state court order.

The starting point for this determination is 28 U.S.C. § 1738 which mandates that all federal courts accord full faith and credit to the judicial proceedings of state courts. This means that in determining the preclusive effect of a state court order or judgment, a federal court must look to the law of the state in which it was entered and give the order or judgment the same preclusive effect that it would receive in that state. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332, 84 L.Ed.2d 274 (1985)(28 U.S.C. § 1738 "commands

a federal court to accept the rules chosen by the State from which the judgment is taken"); see also In re Calvert, 105 F.3d 315, 317 (6th Cir. 1997); In re McNallen, 62 F.3d 619, 624 (4th Cir. 1995); In re Moore, 186 B.R. 962, 968 (Bankr. N.D. Cal. 1995); In re First Actuarial Corp., 182 B.R. 178, 182 (Bankr. W.D. Mich. 1995). Accordingly, this court must look to North Carolina law in determining the preclusive effect of the May 4, 2000 state court order.

Under North Carolina law, which includes both res judicata and collateral estoppel, a final judgment or order, rendered by a court of competent jurisdiction, precludes the relitigation by a party in a later action of any matter actually determined in a prior action in which such party or someone in privity with him was a party. Masters v. Dunston, 256 N.C. 520, 523, 124 S.E.2d 574 (1962)("It is fundamental that a final judgment, rendered on the merits by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter."); Humphrey v. Faison, 247 N.C. 127, 133, 100 S.E.2d 524 (1957)("[W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed."). "Under a companion principle of res judicata, collateral estoppel by judgment, parties and parties in privity

with them-even in unrelated causes of action-are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." King v. Grindstaff, 284 N.C. 348, 356, 200 S.E.2d 799 (1973).

In the present case, the record reflects that there was a prior proceeding involving the plaintiff and defendant in which the plaintiff's bankruptcy discharge was raised by plaintiff as a defense to defendant's efforts to enforce the provision in the consent order obligating the plaintiff to pay $229.00 per month on behalf of the defendant and that defendant countered with the claim that plaintiff's obligation to him had not been discharged because of a failure to list him as a creditor and provide him with proper notice in the bankruptcy case. The record further reflects that the state court adjudicated the dischargeability issue as a necessary part of resolving the matter presented to the court by the plaintiff and defendant. In that regard, the state court specifically ruled that plaintiff's obligation had not been discharged in the bankruptcy "due to her failure to comply with the obligation to list and provide notice to creditors in her bankruptcy." It likewise appears from the record that no appeal was taken in state court and that the order resolving the dischargeability against the plaintiff is a final decree of the state court. The final requirement for the state court order to have preclusive effect is that the court issuing the order must

have been a court of competent jurisdiction. If so, the state court order is binding on the plaintiff and under North Carolina law she is precluded from relitigating the dischargeability of her obligation to the defendant in this adversary proceeding. Resolution of this jurisdictional issue requires a consideration of federal law.

Under 28 U.S.C. § 1334(a), the federal district court has original and exclusive jurisdiction of all cases under Title 11. Under this provision, the bankruptcy court, as a unit of the district court, has exclusive jurisdiction to administer all bankruptcy cases. However, the jurisdictional picture is somewhat different with respect to certain types of disputes or proceedings that may arise during the course of a bankruptcy case. Under 28 U.S.C. § 1334(b), the bankruptcy court has original but not exclusive jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." This statutory language establishes the general rule that state and federal courts have concurrent subject matter jurisdiction over civil proceedings that arise under, arise in, or are related to a bankruptcy case. See In re Franklin, 179 B.R. 913, 919 (Bankr. E.D. Cal. 1995).

Section 523 of the Bankruptcy Code sets forth the various types of debts that are excepted from bankruptcy discharge. Because claims for an adjudication of nondischargeability are

derived from this provision of the Bankruptcy Code, such claims are regarded as "arising under" Title 11. See generally, 1 COLLIER ON BANKRUPTCY ¶3.01[4][c][i] (15th ed. rev. 2001)(causes of action created by title 11, and thus "arising under" title 11, include complaints objecting to dischargeability). Hence, the general rule, subject to certain exceptions, is that state courts have concurrent jurisdiction with federal courts with respect to § 523 dischargeability actions. See In re Franklin, 179 B.R. at 920. One exception to this general rule is created by § 523(c) of the Bankruptcy Code, which provides:

> (C)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

Under this provision, except as provided in § 523(a)(3)(B)[1], a debtor is discharged from debts of the kinds specified in

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[1]Under § 523(a)(3)(B), a bankruptcy discharge does not discharge an individual debtor from a debt "neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit . . . if such debt is of a kind specified in paragraph (2), (4), or (6) [and (15) which was left out of this provision by apparent inadvertent omission] of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such filing and request . . . ."

§ 523(a)(2), (4), (6) and (15) unless the creditor files a timely complaint[2] in the bankruptcy court and a determination is made in the bankruptcy court regarding dischargeability. Subject to the § 523(a)(3)(B) caveat applicable to debts not scheduled by the Debtor, the effect of § 523(c)(1) is that the bankruptcy court has exclusive jurisdiction to determine the dischargeability of debts for money or property obtained by false pretenses or fraud [§ 523(a)(2)], debts for fraud or defalcation while acting in a fiduciary capacity or embezzlement or larceny [§ 523(a)(4)], debts for willful and malicious injury or damage by the debtor [§ 523(a)(6)] and marital debts of the kind specified in § 523(a)(15). See generally, 4 COLLIER ON BANKRUPTCY ¶523.03 (15th ed. rev. 2001).

In the present case, defendant's claim is for a payment ordered as a part of an equitable distribution or property settlement between spouses. As such, it is a debt of the type described in § 523(a)(15)[3]. Ordinarily, this would mean that under § 523(c)(1), only the bankruptcy court would have jurisdiction to

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[2]Pursuant to Bankruptcy Rule 4007(c), a complaint to determine dischargeability of a debt under § 523(c)(1) must be filed in a Chapter 7 case no later than 60 days after the first date set for the meeting of creditors under § 341(a).

[3]Section 523(a)(15) applies to debts "not of the kind described in paragraph (5) [i.e., not alimony and child support] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . ."

determine the dischargeability of the debt. However, because of plaintiff's failure to schedule the debt, § 523(a)(3)(B) was brought into play and the dischargeability issue was transmuted into one under § 523(a)(3)(B). See In re Franklin, 179 B.R. at 924. A dischargeability issue under § 523(a)(3) is a matter over which both the state courts and federal courts have jurisdiction. This means that in the present case, the dischargeability issue, involving a determination of the effect of plaintiff's failure to schedule the debt, was within the jurisdiction of the state court. In re McGregor, 233 B.R. 406, 407 (Bankr. S.D. Ohio 1999)(bankruptcy courts and state courts share concurrent jurisdiction to determine the dischargeability of debts based on a debtor's failure to schedule a debt under § 523(a)(3)(B) even if the bankruptcy court otherwise would have had exclusive jurisdiction under § 523((c)(1)); In re Massa, 217 B.R. 412, 419 (Bankr. W.D.N.Y. 1998)(even if bankruptcy court otherwise had exclusive jurisdiction to determine that a debt was nondischargeable under § 523(a)(2), (4), (6) or (15), such jurisdiction becomes concurrent with state courts when a debtor fails to schedule the debt in accordance with § 521(1)); In re Franklin, 179 B.R. at 924 ("the penalty to the debtor for failing to schedule a debt or otherwise to inform the creditor of the bankruptcy is forfeiture of the right to enjoy exclusive federal jurisdiction and loss of the sixty-day limitations period

applicable in the exclusive jurisdiction actions").

The final point to address is plaintiff's argument that she is entitled to relief from this court because the state court erred in the manner in which it decided the dischargeability issue. In effect, plaintiff asks this court to review and reverse the decision of the state court. Supreme Court rulings[4] that have become known as the Rooker-Feldman doctrine, establish that this court cannot grant such relief. Under the Rooker-Feldman doctrine, "[l]ower federal courts cannot sit in direct review of final state court decisions." Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 229 (4th Cir. 1997). When a state court has jurisdiction to decide a federal question and does so, appellate review of that decision must be sought in the state appellate courts and not in the district court or bankruptcy court. Nationwide Mut. Ins. Co. v. Burke, 897 F.2d 734, 737 (4th Cir. 1990)("Correction by appellate review of any erroneous state court application of collateral estoppel principles must be sought from the courts of West Virginia."). Having presented the dischargeability issue to the state trial court, plaintiff was required to seek appellate review in the state appellate court. Accordingly, this court must decline to review the order entered by the state court.

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[4]Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and District of Columbia Ct. App. v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

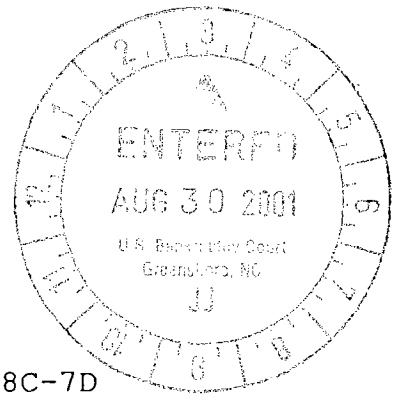
CONCLUSION

The dischargeability issue sought to be raised in this adversary proceeding was actually litigated in an earlier state court proceeding in which the plaintiff was an active, participating party. The order resolving the dischargeability issue was entered by a state court with jurisdiction over the parties and the subject matter of the suit and is a final and binding adjudication. It follows that such adjudication is res judicata and a bar to the relitigation of the dischargeability of the same debt in this proceeding. Accordingly, a judgment will be entered contemporaneously herewith denying the relief sought by the plaintiff and dismissing this adversary proceeding with prejudice.

This 30th day of August, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge



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Debtor.	)	
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Joan I. Merritt,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01-9001
	)	
Otis Dunston,	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED that the relief sought in the complaint filed in this adversary proceeding is denied and this adversary proceeding is hereby dismissed with prejudice.

This 30th day of August, 2001.

WILLIAM L. STOCKS
United States Bankruptcy Judge