

**ENTERED**

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**L.A.B.  
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**

98 NOV 13 AM 11:42

U.S. BANKRUPTCY COURT  
DIST OF SOUTH CAROLINA

C/A No. 96-75484-W

Adv. Pro. No. 98-80091-W

IN RE:

John David Martini and Ann Marie Martini,

Debtors.

Kevin Campbell, Trustee,

Plaintiff,

v.

Heritage Trust Federal Credit Union,

Defendant.

**JUDGMENT**

Chapter 7

Based upon the Stipulation of Facts and Conclusions of Law as recited in the attached Order of the Court, the Trustee's Complaint for the avoidance of certain transfers is granted and pursuant to 11 U.S.C. §550, judgment shall be entered in favor of the Plaintiff against the Defendant in the amount of \$8,250.16.

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
November 13, 1998.

**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:

NOV 10 1998

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

**LISA BAUGHMAN**

Deputy Clerk

*Kerr  
Conrady  
3 to chambers*

**ENTERED**

NOV 16 1998  
L.A.B.  
DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
98 NOV 13 AM 11:43  
U.S. BANKRUPTCY COURT  
DIST OF SOUTH CAROLINA

IN RE:

John David Martini and Ann Marie Martini,

Debtors.

Kevin Campbell, Trustee,

Plaintiff,

v.

Heritage Trust Federal Credit Union,

Defendant.

C/A No. 96-75484-W

Adv. Pro. No. 98-80091-W

**ORDER**

Chapter 7

THIS MATTER comes before this Court upon the complaint of Kevin Campbell, the Chapter 7 Trustee ("Trustee"), seeking to recover certain pre-petition transfers made by John David Martini and Ann Marie Martini ("Debtors") to Heritage Trust Federal Credit Union ("Defendant") as an improper assignment for the benefit of creditors pursuant to South Carolina Code §27-25-10.

The parties stipulated that there were no factual disputes and that the legal issue could be ruled upon by the Court upon the submission of a Stipulation of Facts and proposed orders outlining the parties' respective positions. The Court heard oral arguments on the parties' positions on November 4, 1998. Based upon the arguments of counsel and the evidence presented, the Court adopts the parties' Stipulation of Facts and makes the following Conclusions of Law.

*JW-1 of 8-*

### STIPULATION OF FACTS

1. John David Martini and Ann Marie Martini filed for Chapter 7 relief on August 6, 1996. Prior to filing for bankruptcy relief the Debtors operated a restaurant in downtown Charleston, South Carolina known as Martini's.

2. Kevin Campbell is the duly appointed and acting Chapter 7 Trustee.

3. Heritage Trust Federal Credit Union is a nationally chartered federal credit union existing pursuant to the laws of the United States, does business in the state of South Carolina, and has approximately 55,000 members.

4. The Debtors were members of the Defendant and had numerous loans with the Defendant, including the following:

a. Unsecured Loan 49910-L39 (Line of Credit), opened on November 16, 1994 in the original amount of Eight Thousand (\$8,000.00) Dollars at 13.75% interest. The first monthly payment was due January 3, 1995 in the amount of \$272.80.

b. Motor Vehicle Loan 49910-L25.2, opened on February 12, 1995 in the original amount of Twenty-Five Thousand Five Hundred Thirty-Seven (\$25,537) Dollars at 8.90% interest over 60 months to finance the purchase of a new 1995 Mazda 626 automobile. The first monthly payment was due on March 28, 1995 in the amount of \$530.82.

c. Motor Vehicle Loan 49910-L25.1, opened March 22, 1995 in the original amount of Seven Thousand Eight Hundred Twenty-Nine (\$7,829.00) Dollars at 11.0% interest over 48 months to finance the purchase of a used 1990 Toyota Celica automobile. The first monthly payment was due on May 13, 1995 in the amount of \$207.34. This loan was satisfied through the trade-in of this vehicle for loan 49910.L25.3.

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d. Motor Vehicle Loan 49910-L25.3, opened July 24, 1995 in the original amount of Nineteen Thousand One Hundred Sixty-Three (\$19,163.00) Dollars at 11.90% interest over 72 months to finance the purchase of a new 1995 Mazda B-3000 automobile. The first monthly payment was due on September 7, 1995 in the amount of \$375.49. The 1990 Toyota Celica was used as a trade-in on the purchase of this vehicle.

5. The Debtors had the following transactions on Loan 49910-L39

Payment	2/4/95	\$272.80
Payment	3/4/95	\$272.80
Payment	4/17/95	\$215.82
Payment	5/4/95	\$272.80
Withdrawal	7/5/95	\$300.00
Payment	8/7/95	\$19.80
Payment	8/21/95	\$304.72
Withdrawal	9/24/95	\$110.00
Payment	11/28/95	\$1,036.00
Payment	12/19/95	\$275.00
Payment	12/22/95	\$6,939.16

6. The Debtors never made the required monthly payment on the date the payment was due on this account. Further, the Debtors were at least three months behind on this loan prior to the payment on 11/28/95.

7. The Debtors had the following transactions with loan 49910-L25.2:

Payment	3/28/95	\$530.82
Payment	4/28/95	\$530.82
Payment	6/5/95	\$275.00
Payment	7/9/95	\$530.82
Payment	7/24/95	\$530.82
Payment	8/7/95	\$255.62
Payment	8/22/95	\$530.82
Payment	9/28/95	\$531.00
Payment	10/27/95	\$531.00
Payment	11/28/95	\$530.82
Payment	1/12/96	\$530.82



Payment	2/9/96	\$375.49
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8. The Debtors had the following transactions with loan 49910-L25.1

Payment	5/16/95	\$207.34
Payment	7/10/95	\$207.34

9. The Debtors did not make a timely payment on this loan, and were at least one month behind when the loan was satisfied through the trade-in of the collateral.

10. The Debtors had the following transactions with loan 49910-L25.3

Payment	11/28/95	\$1,126.00
Payment	12/19/95	\$375.49
Payment	1/12/96	\$375.49
Payment	2/9/96	\$531.00
Payment	3/4/96	\$375.49

11. The Debtors were three months behind on this account before the first payment was made on November 28, 1995 and continually failed to make timely payments on this loan.

12. The Defendant's records reveal the Debtors were not timely making their monthly payments to the Defendant.

13. The Defendant is a consumer lender and it is not unusual for some members to be behind on installment payments from time to time.

14. Because of financial problems, the Debtors decided to sell the restaurant. The restaurant was eventually sold and the transaction closed on or about November 22, 1995.

15. After payment of closing costs, fees and secured obligations, including past due rent to the landlord who had commenced a distraint proceeding, the Debtors netted approximately \$10,497.63.

16. The Plaintiff seeks to recover the following transfers made to the Defendant on



loan 49910-L39:

0476	11/28/95	\$1,036.00
0511	12/19/95	\$ 275.00
0516	12/22/95	\$6,939.16

17. At the time of these transfers in paragraph 16, the Debtors were insolvent.

Further, the Debtors were not able to timely pay their financial obligations as they came due.

18. The Defendant was paid in full on the unsecured loan 49910-L39, while the Debtors' other unsecured creditors were not paid in full.

#### CONCLUSIONS OF LAW

Pursuant to the avoiding powers provided in 11 U.S.C. §544, the Trustee may avoid any transfer of property of the debtor that is voidable by applicable state law. As such, the Trustee has invoked South Carolina Code §27-25-10, commonly referred to as the South Carolina Anti-Assignment Act, to attack certain transfers made by the Debtors to the Defendant. South Carolina Code §27-25-10 provides in part that “any assignment by an insolvent debtor of his property for the benefit of his creditors in which any preference or priority is given to any creditor or creditors of the debtor by the terms of the assignment over any other creditor or creditors ... shall be null and void and of no effect whatsoever.”

There are three elements that must be proven to prevail under the South Carolina Anti-Assignment Act according to the Fourth Circuit Court of Appeals.

The provision, thus, prohibits (1) an assignment of property (2) by an insolvent debtor (3) that gives a preference or priority to one or more of his creditors over his other creditors. First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797, 806 (S.C.1939).

In re Hoffman Associates, 16 F.3d 410 (4th Cir. 1993)(Unpubl.).



As to the first element, an assignment is defined as “the act of transferring to another all or part of one’s property, interest or rights” Black’s Law Dictionary 119 (6th ed. 1990). Based upon the stipulation of the parties, the first element of the South Carolina Anti-Assignment Act has been met in as much as it is undisputed that \$8,250.16 in cash was transferred from the Debtors to the Defendant to be applied to the unsecured line of credit. The second element of the South Carolina Anti-Assignment Act has similarly been met as the parties have stipulated that at the time of the transfers, the Debtors were insolvent and were not able to pay their debts in a timely manner as they came due. Finally, as further stipulated by the parties, the Defendant was paid in full on this unsecured loan while other creditors were not paid in full.

Based upon the Stipulation of Facts, the Trustee has met his burden of proof by showing the three elements required for a violation of the South Carolina Anti-Assignment Act. However, the Defendant takes the position that a fourth element is also required which is an element of bad faith or intent to prefer one creditor over another. The Defendant asserts that South Carolina case law applying the Anti-Assignment Act has uniformly involved an element of bad faith on behalf of the transferor and therefore, a bad faith intent to prefer must be implicit in the statute. In support of its argument, the Defendant relies upon the language of an 1895 South Carolina Supreme Court opinion.

From this review of the cases upon the subject in this state, the following propositions, applicable to the case under consideration, are clearly deducible: (1) That an insolvent debtor may be a bona fide mortgage, which is intended merely as a security for a just debt, prefer one of his creditors; (2) that if the mortgage is really designed to operate, not as a security merely, but as a means of transferring the debtor's property to the favored creditor, in preference of the other creditors, then it is void, under the assignment law; (3) that the question as to what was the intention is

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a question of fact.

Porter v. Stricker, 44 S.C. 183, 21 S.E. 635. (1895). In Porter v. Stricker, the South Carolina Supreme Court recognized that a debtor may give a bona fide mortgage to one creditor over another and that it would not be considered to violate the South Carolina Anti-Assignment Act. The Supreme Court stated that the intent of the debtor was an issue to determine if such a transfer was a preferential transfer or a bona fide mortgage. However, not only is the defense of a bona fide mortgage not an issue in the case currently before this Court, but the South Carolina Supreme Court has made clear its determination that intent need not be shown.

[I]t appearing that the object of this section [South Carolina Anti-Assignment Act] is to prevent any preference being effectuated among creditors, except as specifically provided by the statute, the court must determine whether the transfer “provides any preference whatsoever, other than those specifically allowed, without regard to the intention of the parties. Middleton v. Taber, 46 S.C. 337, 24 S.E. 282, 287 (1896).

In re Parker Pontiac-Olds, Inc., Case No. 90-01304, Adv. Proc.91-8067, (Bkrtcy. D.S.C. September 8, 1992)(emphasis added). Additionally, there is no element of intent in the statutory language of the South Carolina Anti-Assignment Act and when a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning. For these reasons, it is the finding of the Court that in this case, the Trustee need not demonstrate the Debtor’s intent to prefer one creditor over another. It is therefore,

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**ORDERED**, that the Trustee's Complaint for the avoidance of the above described transfers is hereby granted and pursuant to 11 U.S.C. §550, the Trustee is entitled to a judgment against the Defendant in the amount of \$8,250.16.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
November 13, 1998.



**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:

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~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~  
**LISA BAUGHMAN**  
Deputy Clerk

*Keve*  
*Conrady*  
*3 to chambers*