THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas
W. Haigh Porter-Special Referee

Case No. 2011-CP-33-00016

Wells Fargo Bank, N.A., successor-in-interest to Wachovia Bank, National Association, Plaintiff

v.

Marion Amphitheatre, LLC, David P. Gannon, Michael Guarco, Carolina Entertainment Complex, LLC and 4 Prophets, LLC a/k/a 4 Profits, LLC, Defendants,

Of Whom,
David P. Gannon and Michael Guarco are the, Appellants,

And
4 Prophets,LLC, a/k/a 4 Profits, LLC is the, Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY DETERMINE THE DAMAGES AND AWARD JUDGMENT?

II. WAS THE NOTICE OF APPEAL TIMELY FILED?

III. HAVE APPELLANTS PROPERLY APPEALED FROM THE ORDER FOR JUDGMENT?

STATEMENT OF THE CASE

Wells Fargo N.A. as Successor in Interest to Wachovia Bank, N.A. (hereinafter referred to as the "Bank") commenced this action on January 12, 2011 seeking to foreclose on real property situate in Marion County. The Bank named the Appellants and Respondent 4 Prophets, LLC aka 4 Profits, LLC (hereinafter referred to as "4 Prophets") as defendants.

On April 18, 2011, 4 Prophets filed an Answer, Counter-Claim, and Cross-Complaint (hereinafter referred to as the Cross-Complaint). The Cross-Complaint set forth claims against the Appellants for fraud, civil conspiracy, and breach of contract accompanied by fraudulent act. The Cross-Complaint was personally served on the Appellants.

On July 20, 2011, the Clerk of Court entered default against Appellants as to the Cross-Complaint. The case was referred to Special Referee Haigh Porter (hereinafter referred to as the "Trial Court") and a hearing was held on July 21, 2011. The Trial Court directed Respondent to submit a written order as to the Cross-Complaint. Upon submission by Respondent of the written order, Appellant Guarco filed and served written objections to the form of the order. The Trial Court heard the objections on September 12, 2011 and on November 7, 2011 the Trial Court signed the Order for Judgment as submitted. On November 21, 2011 Appellant Guarco filed a motion seeking relief from the November 7, 2011 Order. This motion was heard by telephonic hearing on December 8, 2011 and the Trial Court issued its order denying the motion on March 14, 2012. Appellants served their Notice of Appeal on April 12, 2012.

STATEMENT OF FACTS

This foreclosure action was brought by Wells Fargo Bank, NA. The defendants included Marion Amphitheater LLC, as the owner of the subject property and mortgagor, and Appellants Michael Guarco and David Gannon, as personal guarantors. Respondent 4 Prophets, LLC (hereinafter 4 Prophets) was joined as a defendant because of a Notice of Lis Pendens and Injunction filed of record in the Office of the Clerk of Court for Marion County.

In response to the foreclosure complaint, 4 Prophets filed an Answer, Counter-Claim and Cross-Complaint. The Cross-Complaint set forth claims against Appellants and Marion Amphitheater LLC. (R. pp 93-98). The Cross-Complaint was personally served on the Appellants. Neither of the Appellants responded to the Cross-Complaint. Accordingly, an Affidavit of Default was filed and an Order of Default was issued by the Clerk of Court on July 20, 2011.

The Cross-Claims against Appellants related to an agreement between Appellant Guarco and Respondent dated July 17, 2006. Appellant Guarco and Respondent entered into an agreement in July, 2006 relating to the acquisition and operation of the property which became the subject of this mortgage foreclosure action. (The July Letter Agreement; R. pp 123-125). This agreement provided for the sharing of profits and specifically provided that Respondent would own a one-half interest in the property, once acquired by Respondent Guarco. The Cross-Claims against Appellants relate to the loss of this one-half interest due to foreclosure.

The case was referred to the Honorable Haigh Porter, as Special Referee (the Trial Court), and the initial hearing was held on July 21, 2011. The Trial Court directed

Respondent to submit a proposed order supported by an affidavit after Appellants' counsel agreed that testimony as to damages was not required. (R. pp 105-108). Respondent's counsel prepared a proposed Order for Judgment and submitted same to the Trial Court, together with an Affidavit of Mark Bauman (R. pp 127-129) in support thereof. A second hearing was conducted by the Special Referee on August 25, 2011 for the purpose of hearing two Motions to Alter or Amend, one relating to the foreclosure decree and one relating to the Trial Court's order denying a motion to set aside the defaults of Appellant Guarco and Marion Amphitheater, LLC. At this hearing, the Special Referee signed the proposed Order for Judgment, but directed Respondent's counsel not to file the Order until after the following Monday to give Appellants' counsel an opportunity "to raise an objection to the wording".

On August 29, 2011 Appellant Guarco filed and served his Objections To Proposed Order For Judgment (hereinafter referred to as the August 29 Objections). (R., pp 9-16). The Special Referee conducted a hearing on September 12, 2011 to hear the objections. On November 7, 2011 the Special Referee signed the Order for Judgment (the copy of the order signed on August 25, 2011 had been misplaced). (R. pp 3-6). Counsel for Appellant Guarco filed and served a motion on November 21, 2011 (hereinafter referred to as the November 21 Motion) seeking relief from the Order of November 7, 2011. (R. pp. 17-29). This motion was heard by telephonic hearing on December 8, 2011 and the Special Referee issued his order denying the November 21 motion on March 14, 2012. (R. pp. 7-8).

ARGUMENTS

I. THE COURT PROPERLY DETERMINED THE DAMAGES AND AWARDED JUDGMENT WITHOUT TESTIMONY.

The Appellants contend that the damages alleged in the cross-claims are not liquidated, "and the Appellants are entitled to a trial on damages." It is Respondent's position that the Trial Court complied with the requirements of Rule 55, SCRCP and, in any event, no error was preserved.

By defaulting, the Appellants admitted liability to the Respondent on the Cross-Claims. Furthermore, the Appellants admitted the truth of the allegations made against them in the Cross-Claims. "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." Roche v. Young Bros., Inc., of Florence 332 S.C. 75, 504 S.E.2d 311 (1998); citing Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Schenk v. National Health Care, Inc., 322 S.C. 316, 471 S.E.2d 736 (Ct.App.1996); *State* ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct.App.1985).

Respondent, in its Cross-Claims, alleged that it was the equitable owner of an undivided one half interest in the subject property. Respondent further alleged that the property had a fair market value of $25 million and that Appellants, by mortgaging Respondent's interest in the property and then failing to pay the mortgage, deprived Respondent of its interest in the property. By defaulting, the Appellants admitted the value of the property and Respondent's equitable interest therein.

Rule 55 (b)(1) SCRCP provides "When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be

made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs... (Rule 55 SCRCP)(emphasis added). While the phrase "liquidated damages" often refers to an agreement between parties wherein they agree in advance what damages one party will owe the other in the event of a breach of the contract, it can also refer to damages which are certain in amount. Whether or not the damages in this case are "liquidated", the claim is clearly for "a sum which can by computation be made certain", as provided in the Rule.

Even if the damages awarded are considered as unliquidated and incapable of being made certain by computation, Appellants effectively waived any right to demand that a hearing as to the amount of damages be conducted. Both of the Appellants appeared at the July 21 hearing, Appellant Guarco appearing through counsel and Appellant Gannon appearing pro se. During the hearing, Respondent's counsel stated that he was prepared to offer the affidavit or "I can have him (Mr. Bauman) testify fully as to damages...". (R. p 107). Neither of the Appellants objected to the Trial Court's decision to have Respondent's counsel submit a proposed order supported by an affidavit under Rule 55 SCRCP.

By failing to object, the Appellants have waived the right to complain. "It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review." State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). Furthermore, Appellant Guarco's counsel specifically conceded that an affidavit complied with the rules. (R. pp 107-108). An issue conceded in a lower court may not be argued on appeal. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611,

617, 503 S.E.2d 471, 474 (1998); Southern Ry. Co. v. Routh, 161 S.C. 328, 159 S.E. 640 (1930).

II. THE NOTICE OF APPEAL WAS NOT TIMELY FILED

Respondent contends that this appeal should be dismissed for the reason that the Notice of Appeal was not filed and served in a timely manner. Rule 203 (b)(1) SCACR requires that the Notice of Appeal be filed and served within 30 days after receipt of written notice of entry of the order or judgment being appealed from. This requirement is jurisdictional. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The motion of Appellant Guarco dated November 21, 2011 (R. pp 17-29) is entitled "MOTION TO AMEND ORDER AND JUDGMENT". The body of the motion, however, says that it is made "pursuant to Rule 60 and/or 55 (c), SCRCP" and the relief requested is that "the Order and Judgment be set aside pursuant to Rules 60 and/or 55 (c), SCRCP".

A Motion made pursuant to either Rule 60 or Rule 55, SCRCP does not have the effect of tolling the time to file a Notice of Appeal, under Rule 203 SCACR. Furthermore, the November 21 Motion was made by Appellant Guarco only. Appellant Gannon cannot appeal from an order denying a motion made by another party.

It appears from their Initial Brief that the Appellants consider the November 21 Motion as a Rule 59, SCRCP motion. While a timely filed motion to alter or amend a judgment made pursuant to Rule 59, SCRCP tolls the time for filing a notice of appeal, respondent contends that Appellants' Notice of Appeal was not timely filed because the November 21 Motion did not toll the time for filing. All of the issues raised in the November 21 Motion had been raised in the August 29 Objections. Specifically, the

November 21 Motion raised questions regarding service of process in Paragraphs 1, 2, 3 and 4. The issue of service of process was raised in the August 29 Objections under Section I. The issue of damages was raised in Paragraphs 5 and 6 of the November 21 Motion and in Section VII of the August 29 Objections. Finally, Paragraph 7 of the November 21 Motion raises the questions of Connecticut law and venue which were raised in Sections II, III, and IV of the August 29 Objections. Admittedly, the language of the objections is not repeated verbatim. However, Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E. 2d 772 (2004) confirmed earlier cases holding that a Rule 59(e) Motion, made after a motion for new trial or judgment N.O.V. made on the same grounds, would not toll the time for filing the Notice of Appeal. The Notice of appeal filed herein was filed and served on April 12, 2012, more than 4 months after the November 7, 2011 Order for Judgment.

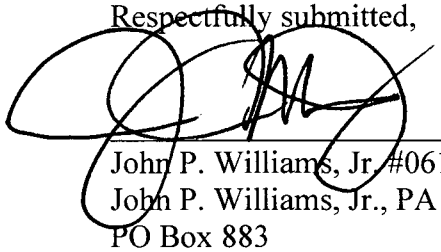
III. NO APPEAL TAKEN FROM ORDER FOR JUDGMENT

The Notice of Appeal states that the Appellants appeal the order dated March 14, 2012, which denied the November 21 Motion. While a copy of the March 14, 2012 order is attached to the Notice of Appeal, no copy of the November 7, 2011 Order for Judgment is attached. If the November 21 Motion is considered to be a timely filed motion under Rule 59 (e), notwithstanding the language of the motion and Respondent's arguments above, it would serve to toll the time to appeal the November 7, 2011 order until 30 days after receipt of notice of the March 14, 2012 order. However, not having noticed an appeal from the November 7, 2011 order, Appellants' appeal is untimely, as to the November 7, 2011 order.

CONCLUSION

For the reasons stated, this Court should affirm the order of the circuit court.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), S.C.A.C.R.

June 5, 2013

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PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief and on the Appellants, through their attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to

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